Supreme Court, U.S.
FILED

No. (1) 96 1560 DEC 13 1996

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In The

Supreme Court of the United States

October Term, 1996

ELLEN P. FULFREE,

Petitioner,

against

ROBERT MANCHESTER and
MANCHESTER LAW OFFICES,

Respondent,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

MORTON N. WEKSTEIN
Attorney for Petitioner
612 E. Grassy Sprain Road
Yonkers, New York 10710
(914) 961-7500

24 pp

Statement under Rule 14. subd 1(a)

The questions presented for review are as follows:

1. Whether an order of district court denying remand of a case commenced in state court is reviewable by the United States Court of Appeals.

2. Whether a district court has power to deny remand where there is a total absence of a federal question in the complaint, two notices of removal and in the decision of the District Court.

3. Whether 28 US Code 1332(A116) now applies to removal and remand of cases commenced in state courts.

4. Whether District Court exceeded its powers by granting leave to serve an amended notice of removal 136 days after the service of the summons and complaint.

5. Whether there is conflict in the decisions of the US Court of Appeals of the 2nd Circuit in other cases with that court's disposition in the instant case, and whether there is conflict between the instant disposition and decisions of the other US Courts of Appeal.

6. Whether there were not substantial procedural errors in both the notice of removal and the "amended notice of removal".

7. Whether the rendering of summary disposition which prohibited publication of the same and its use as stare decisis deprived petitioner of due process and equal protection of law.

Statement under Rule 14, subd 1 (b)

All parties involved in this action are correctly named in the caption hereof. There are no parent companies; there are no wholly owned subsidiaries. Appeal is from US Court of Appeals, 2nd Circuit.

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Statement under Rule 14 subd 1 (c)

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Statement under Rule 14 subd 1(d)

Petitioner has long since written to the Clerk of the District Court, Southern District of New York, asking if the decision of the District Court has been published and Petitioner has received no response. Petitioner has no knowledge on whether it has been published. The opinion of the District Court appears in the appendix at A 5.

The summary disposition of the US Court of Appeals is prohibited to be published and thus does not have, and will not ever have, a citation. It appears herein in the Appendix at A94 .

Statement under Rule 14 subd 1 (e)

i) The decision and order of the District Court is dated January 2, 1996 (A 5). The summary disposition in the US Court Of Appeals is dated October 4, 1966 (A115).

Statement under Rule 14 subd 1e (ii)

Not applicable.

Statement under Rule 14 subd 1e (iv)

Jurisdiction exists under 28 US Code 1254 and 28 US Code 6511 and Rule 10 of the Rules of the United States Supreme Court, and

28 US Code 2101 (e)
28 US Code 1254 (i)
28 US Code 2101
Rules of the US Supreme Court-Rule 10(a) and (c)

Statement under Rule 14 subd 1(f)

28 US Code 1331
28 US Code 1332
28 US Code 2101
28 US Code 1254

Rule 11 of the Federal Rules of Civil Procedure Fourteenth Amendment of the US Constitution Fifth Amendment of the US Constitution

28 US Code 1441
28 US Code 1443
28 US Code 1446
28 US Code 1447
28 US Code 1738
28 US Code 2101
N.Y.S. Constitution Art. 6 §6 subd e
28 US Code 1254

Statement under Rule 14g(i)

In the state court matters did not set beyond the pleadings stage before removed.

Statement under Rule 14g(ii)

It is the contention of the Petitioner that the court of first instance, District Court, SDNY, had no jurisdiction of the subject matter of this action, and lacked subject matter jurisdiction to deny the motion to remand to state court.

Statement under Rule 14 subd g

The plaintiff on August 15, 1995 commenced action in the Supreme Court Westchester County against two defendants, a natural person domiciled in Vermont and a corporation believed to be organized and existing under the laws of Vermont. Service of the summons and complaint, according to defendant, was accomplished August 23, 1995. (All) The plaintiff is, and was, a resident of the City of Yonkers, County of Westchester and State of New York. (A12, A16)

Defendants served a notice of removal to the United States District Court for the Southern District of New York, Foley Square, New York City, dated September 11, 1995. (A9) On or about October 2, 1995 Plaintiff moved in the District Court for the Southern District of New York for an order remanding the case to the Supreme Court Westchester County, sitting in White Plains, New York. (A4) The District Court denied the motion to remand in a memorandum decision and order dated January 2, 1996. (A5) In the said order defendant was granted leave to serve an amended notice of removal. Defendants served an amended notice of removal dated January 6, 1996, received on or about January 9, 1996. (A111) Plaintiff urges, even aside from defects in both notices to remove, that since there is no federal question, the District Court was without jurisdiction to make an order denying remand.

It is submitted that it was beyond the power o9f the District Court, and abuse of discretion, to grant defendant leave to serve a new and amended notice of removal by order dated January 6, 1996. Also, more importantly, plaintiff urges that when there is no federal question presented under 28 US Code 1331, there is no power in the District Court to remove and no power to deny remand to the state.

Further, since there is no federal question present, that is, no question of the kind set forth in 28 US Code 1331, the diversity of citizenship is entirely irrelevant to the questions of removal and remand, and has no tendency to support removal from state court to federal court.

Argument under Rule 14 subd h

POINT I

THE INSTANT APPEAL IS AN APPEAL AUTHORIZED BY STATUTE AND RY TtIE DECIDED CASE LAW, AND IS ONE NOT PROHIBITED BY SUBDIVISION (d) OF 28 US CODE 1447, AND IS IN ALL RESPECTS A FINAL ORDER.

28 US Code 1447 subd.(d) provides:

> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Section 1443 deals with Civil Rights cases, only, and need not detain us.

An order granting removal is reviewable by the Court of Appeals whereas an order remanding an action is not reviewable.

> Chandler v. O'Bryan, 496 F2d 403, cert. den 419 U.S. 986, 95 S.Ct. 245, 42 L Ed 2d 194 rehearing denied 420 U.S. 913, 95 S.Ct. 838, 42 L Ed 2d 845.

The cited case dates from 1974, before the 1988 amendment. Before 1588, removal was accomplished by a petition to the District Court which was granted the power to grant or deny such a petition. Now removal is accomplished unilaterally by a notice served by defendant's attorney. There is no longer an appeal from an order of removal since it is not an order but simply a paper authored by one side, never sanctioned by the court. The only remedy for a plaintiff now is a motion to remand which serves the same function as the prior appeal from the granting of an order of removal, which was specifically allowed by the statute and by the holding of Chandler v. O'Bryan, supra.

If, indeed, an order of the Court to remove from the state court to the District Court was reviewable, a fortiori, the unilateral act of serving a mere notice signed by a party's lawyer must be subject to review. The only way that such a fait accompli can be tested under the present practice is by a motion to remand to state court. If an

order granting removal duly entered by the District Court was reviewable under the former practice, a fortiori, now, a unilateral notice by a litigant is reviewable. Therefore a motion to remand serves the same function as serving papers in opposition to the former petition for removal. By simple analogy, it is clear that if an order of removal was reviewable before 1988, an order denying remand is now reviewable. Removal from state court to District Court remains reviewable, irrespective of the manner in which review is accorded.

Otherwise a plaintiff would be subject to an absolute power vested in his adversary, whose exercise could not be reviewed by any court or judge. Such a proposition would raise constitutional questions with which the courts and litigants can well afford to live without.

The December 9, 1991 revision of 28 US Code §§ 1441-1447 (A 118) was a portion of the enormous overhaul of the federal judicial system, whose stated purpose was to end resort to federal courts in cases which had no claim to federal attention, except diversity of citizenship; in other words cases where there was no federal question to be decided. This accounts for the specific direction of § 1447(d) supra which carefully prohibits review of cases granting remand but just as carefully leaves in place the right of review in cases denying remand.

By its plain language it prohibits review of an order granting remand (except in Civil Rights cases) but leaves intact the right of review of orders denying remand.

An order granting remand relieves the federal courts of the burden of processing appeals in cases, of which the district courts lack jurisdiction.

A horrible example which demonstrates the need for such amendment is Gully v. First National Bank, 291 , U.S. 109, 57 S.Ct. 96, where a case was remanded to state court after trial and judgment

and after appeal to the U.S. Court of Appeals and appeal to the U.S. Supreme Court. There are many other cases where remand is granted after judgment. This accounts very plainly for the desire of Congress and the revisers to be sure that all cases which did not contain a genuine federal question be remanded and be remanded promptly.

To make assurance doubly sure, 28 US Code 1447 subd (c) provides in part as follows:

> "(c) If at any time before final judgment it appears that district court lacks subject matter jurisdiction, the case shall be remanded..." (emphasis added)

This is a very plain command that motions to remand, for lack of subject matter jurisdiction, shall be made as early as possible, to assure a remand before the expenditure of District Court time on motions, discovery, and judgment, and possible appeals. Such a command plainly includes a command that removal and remand are to be disposed of at the outset if possible, including appeals from orders denying remand.

Cases in which the U.S. Court of Appeals of the Second Circuit accepted and decided cases on appeal from matters of removal are the following:

> Encoder Communications, Inc. v. Telegran, Inc., 654 F 2d 198 (2nd Circuit 1981);
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> Hamilton v. Aetna Life, 5 F 3d 642 (2nd Circuit 1981);
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> Minot v. Eckhardt-Minot, 13 F 3d 590 (2nd Circuit 1994);
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> Morgan Guaranty Trust v. Republic of Palau, 24 F 2d 1237 (2nd Circuit 19911);
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> Byrnes v. Faulkner, 362 F. Supp. 804, affirmed 550 F 2d 1303 (D.C.N.Y. affirmed by Court of Appeals for the 2nd Circuit);

La Farge Copper v. Venezolana De Cementos, 31 F 3d 70 (2nd Circuit 1994);

R.G. Barry Corp. v. Mushroom Makers, Inc., 612 F 2d 65 (2nd Circuit 1979),

Relevant also is Wilson v. Republic Steel, 257 US 92, 42 S.Ct. 36.

This writer is prepared to cite 23 cases in other circuits where appeals were heard in removal-remand cases but page limits and discretion demand that this petition cite a few representative cases:

PAS v. Travelers Insurance Co., 7F 3d 349 (3rd Circuit);

Sheeran v. General Electric, 573 F 2d 293 (9th Circuit, Cert den 444 US 868);

Alexander v. Electric Data Systems, 13 F 3d 940 (6th Circuit 1994).

Even aside from the other grounds urged for reviewability of removal-remand controversies is the fact that a removal order is a final determination since it extinguishes forever the case commenced in the courts of the State of New York, commenced there as a matter of right.

Subdivision (c) of 28 US Code 1441 (A119) is different from anything in the law before December 9, 1991 in thrust and application. Before there is discretion (and jurisdiction) to remand here there must be a "§1331" question combined with "otherwise non-removable claims." If there is no "§1331" question, this section gives no authority to a defendant to remove a case to federal court, and no discretion or power in a district court to deny a remand to the state court from which the case came.

Where however, there are combined both a "federal question" and non removable claims" the District Court has discretion to

"determine all issues therein, or, in its discretion, may remand all matters in which State law predominates". If there is no federal question, there is no discretion in District Court to "determine all issues therein, or, in its discretion, may remand all matters in which State law predominates." If there is no federal question, there is no discretion in District Court to deny remand.

In the instant case there is no suggestion that there is even the smallest federal question presented. Neither side has made the faintest suggestion that any federal question of any kind is here presented. Even more compelling the notice of removal fails to show, or even hint, that there is a federal question presented. The decision of the District Court fails to find any federal question. Under such a circumstance there is no power in anyone to remove the case, or to deny remand to state courts. (A 11 , A 5)

Cases decided since the 1991 amendment have uniformly applied the rule that, even where there is a federal question, if questions of state law predominate, the matter must be remanded to the state court from which they were removed.

Lang v. American Electric Power Co., Inc., 785 F. Supp. 1331;

Moralez v. Meat Cutters Local 13, 778 F. Supp. 368;

Moore v. Di Blase, 766 F. Supp. 1331;

World Omni Leasing, Inc., 764 F. Supp. 1442;

Martin v. Drummond Coal Co., Inc., 756 F. Supp. 524;

Martin v. Kernal County, 561 F. Supp. 726 (pre 1991).

A District Court lacking subject matter jurisdiction (§1331 question) must remand the matter to the state court.

Caterpillar, Inc. v. Williams, 482 U.S. 386;

Franchise Tax Board of California v. Construction Laborers, 463 U.S. 2;

Nichols v. Southeast Health Plan, 859 F. Supp. 844;

Oldham v. American Civil Liberties Union 849 F. Supp. 611;

Chittick v. Farmers Insurance Co., 844 F. Supp. 1153;

Blunter v. Greenwood Trust, 856 F. Supp 207.

Tort actions and contract actions under state law are not matters involving federal questions, even where the genesis of such actions rests upon federal rights, restrictions and/or prohibitions.

Lyster v. First National Bank, 829 F. Supp. 1163;

State of Minnesota v. International Association of Entrepreneurs, 858 F. Supp. 937;

Hunneman Real Estate Corp. v. Eastern Middlesex Assn., 860 F. Supp. 906;

Carr v. Axelrod, 798 F. Supp. 168 (E.D. Dist. N.Y.) aff'd 996 F2d 302, cert. den. 114 S.Ct. 334, 126 L Ed 2d 308;

Lamston v. Firestone, 724 F. Supp. 511;

Walsh v. Seagull Energy, 836 F. Supp. 411;

Anderson v. American Airlines, 2 F 3d 590;

Pitchford v. Alladin Steel, 828 F. Supp. 610;

Hunter v. Greenwood Trust, 856 F. Supp. 207;

It is an essential prerequisite of removal to the District Court that the federal question must be pleaded in the complaint, that it must be substantial, and it may not be inferred from the contents of the answer.

Caterpillar v. Williams, 482 U.S. 386;

Cook v. Yorktown Steel, 770 F 2d 1272;

Franchise Tax Board of California v. Construction Laborers, supra;

Charter Fairmont Institute v. Cella Health Strategies, 835 F. Supp. 233;

Bender v. Prudential Ins. Co., 860 F. Supp. 610;

Pitchford v. Alladin Steel, Inc., 828 F. Supp. 610;

Bailey v. Norfolk and Western Rwy. Co., 828 F.Supp. 218;

Costantini v. Guardian Life, 859 F. Supp. 89;

Hill v. Marstan, 13 F 3d 1548;

Nelson v. United Artists, 835 F. Supp. 844;

In the instant case there is not one word in the complaint implying that there is even a hint of a federal question present. The instant case is based entirely upon New York State law of torts and a New York State statute dealing with certain forms of malpractice by lawyers.

Paragraph 3 in the original Notice of Removal and paragraph 3 in the amended Notice of Removal both say:

"3. The ground for removal is that diversity jurisdiction exists, as there is complete diversity of citizenship and the amount in controversy exceeds the sum of $50,000.00."

The District Court relied upon the same grounds. (A6) Diversity of citizenship is still good ground for commencing suit in federal court, but it is no longer a ground for removal from a state court in the absence of a question defined in 28 US Code 1331.

While it would not matter if there were such a suggestion in defendant's answer or in the notice of removal, it is most interesting and conclusive that neither of those utterances by defendant deal with any issue which could possibly be deemed a "federal question".

POINT II

THE DISPOSITION OF PLAINTIFF'S APPEAL BY THE U.S. COURT OF APPEALS DEPRIVES PLAINTIFF OF DUE PROCESS OF LAW AND OF EQUAL PROTECTION OF LAW.

Both the Fifth Amendment and the Fourteenth Amendment of the U.S. Constitution now guarantee due process of law and equal protection, and as they are now interpreted, these rights are guaranteed not only against the action of the several states, but against action by the United States Government itself.

28 US Code 1738 (A 123)

Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S.Ct. 1895;

Weinberger v. Weisenfeld, 420 U.S. 636, 95 S.Ct. 1225.

The summary disposition by the US Court of Appeals in this case dated October 4, 1996 deprives plaintiff, both of due process of law, and of equal protection of law. (A 115) It provides:

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO TIME ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE. IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

There is no rational basis for using such a summary disposition instead of the ubiquitous "Affirmed without opinion". There is a distinction between the two but not a rational one. The distinction is that the Court of Appeals panel did not have enough faith in the correctness of this result to expose it to the view of other courts, of the members of the bar, federal and state, of federal and state officials, and of the public generally.

This entire matter of secrecy by courts and its invasion upon the common law right to know of the public the contents and records of court proceedings has been dealt with in the case of Richard M. Nixon v. Warren Communications, 435 US 58, 8 S.Ct. 1306, 55 L Ed 2d 570, dealing with the famous presidential tapes. There were four dissenting justices who wrote three dissenting opinions. All of the four opinions (majority and dissents) recognized that there is a common law right in the public generally to have access to judicial records. Justice Marshall described it as "a precious common law right, one that predates the Constitution itself." There the Court denied access to the tapes (1) because of the terms of a special enactment dealing with them, The Presidential Recordings Preservation Act and (2) more importantly because the content of the tapes had long since been disseminated to the general public by radio and television, and the Communications Co. sought them only for commercial purposes, and not to further any purpose connected with the public's right to know the contents of the court's records.

This holding does not diminish the public's right to know. On the contrary it reinforces it. What is done in the instant case, the use

of a secret disposition, is not only foreign to the holding of Nixon, it is a procedure dangerous to our whole democratic structure.

Where there is an overpowering reason for sealing some records, most typically a case of multiple rape of a young female, the Court held that the sealing of the record or parts thereof must be performed by the Court which is the custodian of the records, to wit, the trial court.

POINT III

THE COURT BELOW LACKED POWER TO GRANT LEAVE TO SERVE AN AMENDED NOTICE OF REMOVAL UNDER TIME CIRCUMSTANCES OF THIS CASE, SO THAT SUCH AN AMENDED NOTICE WAS SERVED 139 DAYS AFTER TtIE SERVICE OF THE COMPLAINT WHICH STARTED TIME RUNNING OF TIME 30 DAYS PERMITTED BY LAW FOR TFtE SERVICE OF A NOTICE OF REMOVAL.

The District Court herein held that there is no power in the District Court, in the face of a fundamental defect, to extend the 30 day time limit for serving a notice of removal. Lack of jurisdiction is certainly a fundamental, fatal flaw and is a matter of great substance. In addition, the notice of removal and the amended notices of removal are deficient as a result of the fact that both bear the same blemishes. It is submitted that all of the defects in the notices of removal are fundamental.

28 US Code 1446 (a) provides that a notice of removal shall be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure. (A119)Subdivision (b) of the same section provides that a notice of removal must be served within 30 days after defendant receives "a copy of the original pleading." (All9)

Use of the word "shall" shows that compliance is mandatory and that compliance was not intended to be grade as to which are grave and which are middling and which are slight.

Holding that the 30 day requirement is mandatory are:

Burns v. Standard Life Insurance, 135 F. Supp. 904;

Biscup v. People of the State of N.Y., 129 F. Supp. 765 (W.D. NY);

Castle v. Laurel Creek Co., 848 F. Supp. 62;

Bradwell v. Silk Greenhouse, 828 F. Supp. 940.

Very important here, are the holdings that the policy of the law is against removal, and that all questions on remand, must be resolved against the person seeking removal to Federal Court.

Beech v. Prudential, 845 F. Supp. 829;

Alexander v. Electronic Data Systems, 13 F. 3d 940;

Wesley v. Mississippi Transport, 857 F. Supp. 523.

All of the defects relied on by plaintiff in its motion to remand are substantial. Most astonishing is that even in the "amended notice of removal", the defendant failed to mention, or suggest, or even hint, at the presence of a federal question in plaintiff's complaint. (A44)

Compliance with Rule 11 is mandatory in the drafting of a notice of removal: §1446(a) of title 28 US Code requires that the notice of removal shall be signed in the manner required by Rule 11 of the Rules. (A122)

It is immediately apparent that signing by an individual attorney "in the attorney's individual name" is designed to perform the office formerly accomplished by a verification under oath in a pleading, or in an affidavit.

The United States Supreme Court has decided the very ques-

tion raised in this discussion in Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120.

Pavelic and LeFlore was a law partnership. LeFlore, a partner, signed several papers as follows:

> "Pavelic and LeFlore
> By (s) Ray L. LeFlore
> A Member of the Firm
> Attorneys for the Plaintiff"

The Court held that the fact that LeFlore signed explicitly for the firm was of no consequence since Rule 11 says "that the paper must be signed by at least one attorney of record in the attorney's individual name" (Emphasis in the original).

On page 126 the Court said as part of its holding the following:

> "The purpose of Rule 11 as a whole is to bring home to the individual signer his personal, and non-delegable responsibility."

Relative to the matter of Mr. Adams signing as "Associated with the firm" the Court said at page 127:

> 11. Moreover, the psychological effect aside, there will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him, and not divert part of it to a partnership of which he may not (even he is only an associate) be a member, or which (if he is a member) may not choose to seek recompense from him.

Mr. Adams as an associate was not the attorney of record, nor part of the attorneys of record.

It is worthy of note that in the original notice of removal Mr. Adams' signature consists only of a capital "M" with no surname or

no initial designed to indicate a surname. (A10, A13) This was clearly not even a colorable effort to comply with Rule 11. (A 122)

The defects in the notice of removal which are essential matters of substance are not remedied in the so-called amended notice of removal and are as follows: (1) lack of any showing of subject matter jurisdiction discussed above (2) failure to sign in a manner mandated by Rule 11 of the Federal Rules of Civil Procedure (3) failure to designate the Westchester (White Plains) Division of Southern District of New York (4) failure of defendant to serve the Clerk of the County of Westchester, and make proof of such service upon said Clerk, and failure to identify him by name.

1. Lack of subject matter jurisdiction has already been discussed.

2. The signature in the notice of removal and in the amended notice of removal fail to comply with Rule 11 of the Rules of Civil Procedure, which compliance is mandatory in a notice of removal under §1446(a) of title 28. (A 119)

3. The notice of removal is directed to "the Clerk of the Court", a title which does not exist in any Supreme Court of the State of New York and does not identify by name the person served.

There are many clerks in the courtrooms of the Supreme Court of Westchester County, all of them clerks of various parts of Special Terms or Trial Terms or any extraordinary term created. There is no such person in existence who wears, or who is entitled to wear, the title "Clerk of the Court" or "Clerk of the Supreme Court".

The Constitution of the State of New York provides in its Article 6 §6 subd. e:

> The clerks of the several counties shall be clerks of the supreme court, with such powers and duties as shall be prescribed by law.

The clerks of the various parts of the Court are simply deputies appointed by the County Clerk himself, and the Clerk must act in his capacity as is prescribed by the constitution and may not appoint anyone to act during his absence, not his deputy or anyone else.

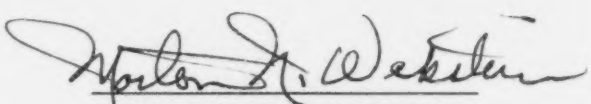
Devoy v. Craig, 196 App. Div. 567, 178 N.Y. Supp. 478 aff'd 231 N.Y. 186.

Therefore the failure to show on the notice of removal that it was directed to the County Clerk of Westchester County, and the failure to append proof of service upon that official, and to set down the name of the person served constitute fatal defects in the notice of removal.

Moreover, it is not possible to determine the identity of the person served with the notice of removal or his title and position.

4. The notice of removal is defective in that it fails to seek removal to the White Plains Division of the Southern District of New York.

Wherefore the petitioner respectfully asks that this petition be granted, and that such other and further relief as the Court deems proper in the premises be granted.



MORTON N. WEKSTEIN
Attorney for Petitioner
612 East Grassy Sprain Road
Yonkers, New York 10710
914-561-7500

(2)

FILED

961560 DEC 13 1996

No.

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ELLEN P. FULFREE,

Petitioner,

against

ROBERT MANCHESTER and
MANCHESTER LAW OFFICES,

Respondent,

Appendix for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX FOR WRIT OF CERTIORARI

MORTON N. WEKSTEIN
Attorney for Petitioner
612 E. Grassy Sprain Road
Yonkers, New York 10710
(914) 961-7500

125 pp

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1. Docket Entries
2. Memorandum Decision and Order of District Court
3. Notice of Filing, Notice of Removal and exhibits attached thereto including summons and complaint, retainer agreement between plaintiff and defendant, page from Martindale-Hubbel and defendant's motion to withdraw
4. Amended Notice of Removal without exhibits which are identical to those on original Notice of Removal
5. Letter dated February 1, 1996 to Richard W. Fulfree, Esq. from Defendant's Attorney
6. Letter dated March 11, 1996 to Richard W. Fulfree, Esq. from Defendant's Attorney 7. Notice of Motion to Remand Case to State Court with Exhibits
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10. 28 US Code 1443
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APPEAL
U.S. District Court
Southern District of New York - Civil Database (Foley Square)
CIVIL DOCKET FOR CASE #: 95-CV-7723

Fulfree v. Manchester, et al
Assigned to: Judge Denny Chin
Demand: $5,300,000
Lead Docket: None
DKT# in other court: None

Filed: 09/07/95
Jury demand: Defendant
Nature of Suit: 360
Jurisdiction: Diversity

Cause: 28:1441 Petition for removal

ELLEN P. FULFREE
plaintiff

Richard W. Fulfree, Esq.
[COR LD NTC]
Richard W. Fulfree
621 E. Grassy Sprain Road
Yonkers, NY 10710

v.

ROBERT MANCHESTER
defendant

Martin B. Adams
[COR LD NTC]
Kopff, Nardelli & Dopf
440 Ninth Avenue
New York, NY 10001
(212)244-2999

MANCHESTER LAW OFFICES
defendant

Martin B. Adams
(See above)
(COR LD NTC]

==========

ROBERT MANCHESTER
counter-claimant

Martin B. Adams
(COR LD NTC)
Kopff, Nardelli & Dopf
440 Ninth Avenue
New York, NY 10001
(212)244-2999

MANCHESTER LAW OFFICES
counter-claimant

Martin B. Adams
(See above)
(COR LD NTC]

Docket as of February 2, 1996 3:15 pm Page 1

Proceedings include all events. APPEAL

1:95cv7723 Fulfree v. Manchester, et al

v.

ELLEN P. FULFREE
counter-defendant

Richard W. Fulfree, Esq.
(COR LD NTC)

Richard W. Fulfree
621 E. Grassy Sprain Road
Yonkers, NY 10710

Docket as of February 2, 1996 3:15 pm page 2

Proceedings include all events. APPEAL
1:95cv7723 Fulfree v. Manchester, et al

9/7/95	1	NOTICE OF REMOVAL from Supreme State Court County of Westchester; FILING FEE $120.00 RECEIPT #245605 (ba) [Entry date 09/11/95]
9/7/95	2	Rule 9 certificate filed by Robert Manchester, Manchester Law Off. (ba) [Entry date 09/11/95]
9/7/95	--	It is suggested that the case be classified as standard. Magistrate Judge Francis is so Designated. (ba) [Entry date 09/11/95]
9/13/95	3	NOTICE of Filing Notice of Removal by Robert Manchester, Manchester Law Off. (lam) [Entry date 09/21/95]
9/14/95	4	ANSWER to Complaint by Robert Manchester, Manchester Law Off. (Attorney), ; Firm of: KN&D by attorney Martin B. Adams for defendant Manchester Law Off. (dd) [Entry date 09/21/95]
10/3/95	5	AMENDED ANSWER to Complaint by Robert Manchester, Manchester Law Off. : amends [3-1] answer (pl) [Entry date 10/10/95]
10/3/95	5	COUNTERCLAIM by Robert Manchester, Manchester Law Off. against Ellen P. Fulfree (pl) [Entry date 10/10/95]

10/4/95	6	NOTICE OF MOTION by Richard W. Fulfree to remand this case to the Supreme Court, Westchester County w/attch. aff. and statement in support, Return date 10/20/95 (pl) [Entry date 10/11/95)
10/11/95	7	MEMORANDUM by Ellen P. Fulfree in SUPPORT of [6-1] motion to remand this case to the Supreme Court, Westchester (lam) [Entry date 10/17/95]
10/12/95	8	DEMAND for jury trial by Robert Manchester, Manchester Law Off. (pl) [Entry date 10/18/95]
10/23/95	10	AFFIRMATION by Robert Manchester, Manchester Law Off. in opposition Re: [6-1] motion to remand this case to the Supreme Court, Westchester County (emil) [Entry date 10/26/95]
10/25/95	9	REPLY AFFIDAVIT of R. Fulfree by Ellen P. Fulfree in opposition to deft's affirmation n oposition [sic] 10/20/95 (cd) [Entry date 10/26/95)
1/3/96	11	MEMORANDUM DECISION AND ORDER DENYING (6-1] motion to remand this case to the Supreme Court, Westchester County, I hereby grant Manchester leave to file Amended Notice of Removal Within days hereof., Set pretrial conference for 4:00 2/2/96 in Courtroom 11A of the Courthosue [sic] at 500 Pearl Street. SO ORDERED: (signed by Judge Denny Chin) (ae) [Entry date 01/04/96) [Edit date 01/04/96]

Proceedings include all events. APPEAL

1:95cv7723 Fulfree v. Manchester, et al

1/19/96	12	NOTICE OF APPEAL by Ellen P. Fulfree ; from [11-1] order I hereby grant Manchester leave to file Amended Notice of Removal within days hereof. . Copies of notice of appeal mailed to Attorney(s) of Record: Martin B. Adams . (as) [Entry date 01/25/96]
1/25/96	--	Notice of appeal and certified copy of docket to USCA: [12-1] appeal by Ellen P. Fulfree ; Copy of notice of appeal sent to District Judge. (as)
1/30/96	13	Filed Memo_Endorsement on letter dated 1/23/96, the application to transfer to White Plains is DENIED (signed by Judge Denny Chin) (cd) [Entry date 01/31/96]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ELLEN P. FULFREE,

Plaintiff,

MEMORANDUM DECISION and ORDER
95 Civ. 7723 (DC)

-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants.

----------x

APPEARANCES:

RICHARD W. FULFREE, ESQ.
Attorney for Plaintiff
612 E. Grassy Sprain Road
Yonkers, New York 10710

KOPFF, NARDELLI & DOPF
Attorneys for Defendants
By: Martin B. Adams, Esq.
440 Ninth Avenue
New York, New York 10001

CHIN, D.J.

Plaintiff Ellen P. Fulfree ("Fulfree") originally filed this attorney malpractice action in Westchester County Supreme Court. Defendants Robert Manchester and Manchester Law Offices (collectively "Manchester") removed the action to this Court pursuant to 28 U.S.C. § 1446. Fulfree has now moved to remand the action. For the reasons stated below, the motion is denied.

BACKGROUND

Fulfree served Manchester with a copy of her summons and complaint on August 23, 1995. Thereafter, on September 7, 1995, Manchester filed a Notice of Removal. The notice alleges that this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 based on complete diversity of citizenship an amount in controversy exceeding $50,000. The notice does not state defendant Manchester Law offices' place of incorporation or principal place of business. It does state, however, that "Manchester Law Offices is deemed to have a residence" in Vermont. In fact, Manchester Law Offices is a Vermont corporation with its principal place of business in Vermont. Fulfree now moves to remand the action to state court, arguing that the Notice of Removal is defective.

DISCUSSION

Despite her relatively voluminous submissions, Fulfree raises only one meritorious issue: Manchester's Notice of Removal omitted certain information required by Local Civil Rule 25. Specifically, the Notice of Removal fails to set forth Manchester Law offices' place of incorporation and principal place of business.

Under 28 U.S.C. § 1446(b), a petition for removal must be filed "within thirty days after the receipt by the defendant, through service or otherwise, a copy of the initial pleading setting forth the claim for relief upon which such action is based...." Furthermore, when removal jurisdiction is based upon diversity of citizenship, this district's local rules require the Notice of Removal to "set forth the states of citizenship and residence, address of each party named in the caption and, in the case of a corporation, the state of incorporation and of its principal place of business...." Local Civil Rule 25(b). A defendant seeking removal must strictly comply with these requirements; where there is doubt as to whether the requirements have been satisfied, the case should be remanded. See, e.g. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941); Somlyo v. J. Lu-Rob Enters., Inc., 932 F.2d 1043, 1046 (2d Cir. 1991).

Here, Manchester's Notice of Removal failed to comply with Local Civil Rule 25, as it omitted defendant Manchester Law Offices' place of

incorporation and principal place of business. Thus, the Notice of Removal was indeed defective. Nevertheless, a distinction exists between a fundamental defect, witch cannot be untimely amended, and a technical defect, which can be amended after the 30-day period has run. CBS Inc. v. Snyder, 762 F. Supp. 71, 73 (S.D.N.Y. 1991); see generally 14 AC Wright, A. Miller & E. Cooper, Federal Civil Practice and Procedure § 3733, at 536-37.

The defect in Manchester's Notice of removal was merely technical. The notice alleged diversity of citizenship and stated that Manchester Law Offices' residence is Vermont. Manchester simply did not provide the factual allegations supporting a corporation's residence for jurisdictional purposes, namely, place of incorporation and principal place of business. Such an omission merely represents a technical defect in a notice or removal. Grow Group v. Jandernoa, No. 94 Civ. 5679(RPP), 1995 WL 60025, at *2-3 (S.D.N.Y.) Feb. 10, 1995); Snyder, 762 F. Supp. at 75 & n.5. Moreover, Manchester's proposed Amended Notice of Removal cures this defect. Accordingly, I will grant Manchester leave to file an amended notice of removal. Fulfree's other grounds for remand to state court are meritless and thus are rejected.

CONCLUSION

For the foregoing reasons, Fulfree's motion to remand is denied. I hereby grant Manchester leave to file an amended Notice of Removal within 20 days hereof. Counsel for the parties are to appear for a pretrial conference on February 2, 1996 at 4:00 p.m. in Courtroom 11A of the Courthouse at 500 Pearl Street.

SO ORDERED

Dated: New York, New York
January 2, 1996

[signed] DENNY CHIN
United States District Judge

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

ELLEN P. FULFREE,

NOTICE OF FILING
Plaintiff,

NOTICE OF REMOVAL

-against-

Index No. 95-13051

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants.

----------x

TO: CLERK OF THE COURT:

YOU WILL PLEASE TAKE NOTICE, that defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES have filed in the United States District Court for the Southern District of New York, 40 Foley Square, New York, New York, 10007 a Notice of Removal of this Supreme Court action to the District Court of the United States, Southern District of New York, 40 Foley Square, New York, New York 10007.

A true and correct copy of the Notice of Removal is attached to this notice. The filing of this notice and copy of Notice of Removal with the Clerk of the Supreme Court of the State of New York, County of Westchester, effects a removal to the District Court of the United States, and the Supreme Court of the State of New York, County of Westchester may proceed no further, unless this case is remanded, 28 U.S.C. 1446(d).

Dated: September 11, 1995
New York, New York

Respectfully submitted,
KOPFF, NARDELLI & DOPF
By: [signed]
MARTIN B. ADAMS
Associated with the Firm
Attorneys for Defendants
440 Ninth Avenue
New York, New York 10001
(212) 244-2999

TO: RICHARD W. FULFREE, ESQ.
Attorney for Plaintiff
612 Grassy Sprain Road
Yonkers, N.Y. 10710

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
ELLEN P. FULFREE,

Plaintiff, NOTICE OF REMOVAL

-against-

Docket No. [stamped] 95 CIV. 7723 Received 9/7/95, U.S.D.C. S.D. N.Y.

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants.----------x

Defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES hereby file this Notice of Removal of the above-described action to the United States District Court for the Southern District of New York, 40 Foley Square, New York, New York 10007 from the Supreme Court of the State of New York, County of Westchester, where the action is now pending, as provided by Title 28, U.S.C. Chapter 89, and state:

1. This cause was commenced in the Supreme Court of the State of New York, County of Westchester by filing of a Summons and Complaint on or about August 15, 1995, and process was served upon removing defendants on August 23, 1995. A copy of plaintiff's complaint is annexed hereto as Exhibit "A".

2. The action is a civil action for compensatory damages based upon alleged lawyer malpractice.

3. The ground for removal is that diversity jurisdiction exists, as there is complete diversity of citizenship and the amount in controversy exceeds the sum or value of $50,000.

4. Plaintiff contends this matter in dispute exceeds the sum of

fifty thousand dollars ($50,000) exclusive of interest and costs.

5. At the time of commencement of this action, plaintiff resided at 115 Bennett Avenue, Yonkers, New York. Defendant MANCHESTER LAW OFFICES is deemed to have a residence at One Lawson Lane, Burlington, Vermont 05401. Defendant ROBERT MANCHESTER resides at 5 Pond Road, Shelburne, Vermont 05482.

6. A copy of all pleadings, process, and orders served upon defendants is filed with this notice.

7. Defendants will give written notice of the filing of this notice as required by 28 U.S.C. Section 1446(d).

8. A copy of this notice will be filed with the Clerk of the Supreme Court of the State of New York, County of Westchester, as required by 28 U.S.C. Section 1446(d).

9. This notice of removal is being filed within thirty days after the receipt by defendants of a copy of the initial pleading setting forth the claim for relief upon which the action is based, 28 U.S.C. Section 1446(b).

WHEREFORE, defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES respectfully request that this action proceed in this Court as an action properly removed to it.

Dated: September 6, 1995
New York, New York

Respectfully submitted,

KOPFF, NARDELLI & DOPF

By: [signed]
MARTIN B. ADAMS
Associated with the Firm
Attorneys for Defendants
440 Ninth Avenue

New York, New York 10001
(212) 244-2999

TO: RICHARD W. FULFREE, ESQ.
Attorney for Plaintiff
612 East Grassy Sprain Road
Yonkers, N.Y. 10710

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ELLEN P. FULFREE,

Plaintiff,
-against-
ROBERT MANCHESTER and MANCHESTER LAW OFFICES,
Defendants.

SUMMONS AND COMPLAINT

RICHARD W. FULFREE, ESQ.
Attorney for Plaintiff
612 East Grassy Sprain Road
Yonkers, New York 10710
(914) 961-7500

To: [stamped] received 8/23/95
KOPFF, NARDELLI & DOPF

PLEASE TAKE NOTICE
[printed] RICHARD W. FULFREE, ESQ.
Attorney for PLAINTIFF
612 East Grassy Sprain Road
Yonkers, New York 10710

STATE OF NEW YORK, COUNTY OF WESTCHESTER ss:
ELLEN P. FULFREE being sworn says: I am PLAINTIFF in the action herein; I have read the annexed COMPLAINT
(x) know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on the information and belief, and as to those matters I believe them to be true.

[signed] ELLEN P. FULFREE

Sworn to before me on August 15, 1995
[signed] Richard W. Fulfree
[stamped] RICHARD W. FULFREE

NOTARY PUBLIC, State of New York
No. 49 5439
Qualified in Westchester County
Commission Expires 12/19/97

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ELLEN P. FULFREE,

Plaintiff
-against-
ROBERT MANCHESTER and MANCHESTER LAW OFFICES,
Defendant

Index No. 95-13051
Plaintiff designates WESTCHESTER County as the place of trial

The basis of the venue is
PLAINTIFF'S RESIDENCE

Summons with Notice

Plaintiff resides at
115 BENNETT AVENUE
YONKERS, NEW YORK
County of WESTCHESTER

To the above named Defendant

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgement will be taken against you by default for the relief demanded in the complaint.

Dated, AUGUST 15, 1995

Defendant's address: ONE LAWSON LANE, PO BOX 1459 BURLINGTON, VERMONT 05402

RICHARD W. FULFREE, ESQ.
Attorneys for Plaintiff
Office, Post Office Address and Telephone Number
612 E. GRASSY SPRAIN ROAD
YONKERS, NEW YORK 10710
(914) 961-7500

Notice: The object of this action is MONEY JUDGEMENT

The relief sought is MONEY JUDGEMENT

Upon your failure to appear, judgement will be taken against you by default for the sum of $5,325,000.000 with interest from June 15, 1981 and the cost of this action.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

ELLEN P. FULFREE,

COMPLAINT
Plaintiff,
Index No. 95-13051

-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants.

----------x

Plaintiff of defendants by her attorney, RICHARD W. FULFREE, respectfully shows to the court and alleges:

FOR A FIRST CAUSE OF ACTION

FIRST: That upon Information and Belief the defendant, Manchester, is an attorney-at-law admitted to practice in the State Vermont and in other jurisdictions, and has practiced extensively within the State of New York.

SECOND: That upon Information and Belief Manchester Law Offices is a Professional Corporation duly organized and existing under the laws of the State of Vermont.

THIRD: That in June 1981 defendant Manchester and plaintiff discussed over the telephone, Burlington, Vermont to Yonkers, New York, the matter of plaintiff retaining said Manchester to bring suit, on plaintiff's behalf, against A.H. Robins Co., Inc. because of the severe injuries sustained by plaintiff by reason of her having used and worn the "Dalkon Shield" intrauterine device, manufactured and produced by said Robins Co. and put into nationwide and international commerce by said Robins Co.

That during said conversation and on many occasions thereafter, defendant represented to the plaintiff that he was a specialist and expert in products liability and negligence arising therefrom and particularly in law relating to the defects in the Dalkon Shield. Plaintiff believed the said representations and in reliance thereon executed a written agreement retaining defendant (Exhibit A).

FOURTH: At the time plaintiff spoke to defendant he was associated with a law firm in Burlington, Vermont, operating under the firm name and style of Lisman & Lisman. Thereafter and at some time after June of 1981, defendant severed his association with that firm and he retained as his own personal case plaintiff's action against Robins Co.

FIFTH: That on or about the 1st day of July, 1983 the defendant Manchester organized a professional corporation under the firm name and style of "Manchester Law Offices', and on communications therefrom there was another person mentioned on the letterhead, to wit, one O'Neill.

SIXTH: Defendant Manchester continued so to practice until January 1988, after which the name of O'Neill was crossed out and omitted from the letterhead.

SEVENTH: From time to time other persons appeared on the letterhead of Manchester Law Offices but defendant's name continued to appear down to the date hereof.

EIGHTH: Annexed hereto as Exhibit A of this complaint is the retainer agreement mailed by defendant Manchester to plaintiff on June 15, 1981 and signed in Yonkers, New York and returned to defendant Manchester on January 24, 1981. Defendant Manchester represented to plaintiff that he personally would be plaintiff's lawyer and represent plaintiff in the instant action and has dealt with plaintiff directly until he resigned in this case by a motion to withdraw from this case bearing date January 6, 1995, but actually served by mail on January 6, 1995.

NINTH: Before plaintiff's signing the retainer agreement, "Exhibit A" hereof, defendant Manchester represented to plaintiff that he was an expert in product liability cases, and had thousands of Dalkon Shield cases both in the United States and England annexed hereto as

Exhibit B and made a part hereof is the description of said Manchester's professional capabilities and the nature of his law practice as it appeared in Martindale-Hubbell.

TENTH: Upon Information and Belief the defendant had very many cases in New York State concerning the Dalkon Shield and had contracts (retainer agreements) with very many plaintiffs residing in New York State and had in June of 1981 many clients in the State of New York and was conducting a business in the State of New York and has regularly appeared in courts within the State of New York.

ELEVENTH: That defendant regularly solicits product liability, negligence and fraud cases within the State of New York and has derived substantial revenue from such cases and has performed acts which he had expected to have consequences in the State of New York.

TWELFTH: That defendant has committed tortious acts within and without the State of New York, to wit, malpractice and fraud, and infidelity to a client, to wit, acts which were intended and did harm plaintiff.

THIRTEENTH: That from June of 1981 until the defendant's resignation from this case by motion, served on January 6, 1995, a period of over 13-1/2 years, defendant did absolutely nothing of consequence to ready plaintiff's case against Robins for trial, performed no discovery on behalf of plaintiff, and turned over to plaintiff no documents generated by or during discovery. That such delay constituted negligence, per se.

FOURTEENTH: That pursuant to the CRF and administrative orders in the Robins Chapter 11 "bankruptcy" of all cases pending A.H. Robins Inc.'s pending cases were required to be certified for Trial against the Dalkon Shield Claimants Trust: that upon Information and Belief defendant did not accomplish the said certification in this case until March 22, 1992, although the petition for reorganization of A.H. Robins Inc. occurred in 1985.

FIFTEENTH: That the papers turned ever to plaintiff and her attorney after Manchester's voluntary motion to be relieved contained no documents of any kind originated by said defendant or discovered by him,

which had any tendency to show preparation for trial.

SIXTEENTH: Plaintiff was greatly injured by said delay since by terms of the Claims Resolution Facility and the orders entered in the Chapter 11 reorganization of A.H. Robins Co., Inc. the plaintiff was deprived entirely of her right to be awarded punitive damages and entirely of all discovery devices except interrogatories and requests to admit, which greatly reduced the amount of compensatory damages provable and additionally, as a result of the delay, plaintiff lost the chance to seek any discovery of adversary A.H. Robins Co., Inc. by any of its officers, directors and employees and to examine them as witnesses since upon Information and Belief, all of those persons were dead or retired on or before January of 1995.

SEVENTEENTH: That defendant Trust advanced and used the plaintiff's 13-1/2 years in plaintiff's action against the Trust very successfully in its effort to limit and destroy plaintiff's discovery so that as of the date hereof, plaintiff has been accorded no meaningful discovery and the event will be forced to embark upon the trial against the trust without the benefit of true discovery as the same is normally accorded in Federal Court.

EIGHTEENTH: The defendant on or about January 6, 1995 made a motion in the U.S. District Court, Southern District of New York, to be relieved in the instant case in which he said "Nevertheless, I can represent to the Court that my decision involve (sic) irreconcilable differences regarding the proper management of this litigation." Annexed hereto is said motion marked Exhibit C hereof: said motion failed to mention any claim for disbursements and made no attempt to reserve any right thereto.

NINETEENTH: That the statement quoted in paragraph 18 was false and untrue and was deliberately made false since the differences between the parties was not to the future conduct of the litigation but as to whether the litigation was to have any future.

TWENTIETH: The defendant was urging and seeking to compel plaintiff to abandon the plaintiff's action against the substitute defendant, Dalkon Shield Claimants Trust, which was a defendant substituted in the place and stead of A.H. Robins Co., Inc. by the Bankruptcy Court in the

Chapter 11 reorganization of A.H. Robins Co., Inc.

TWENTY-FIRST: The difference between plaintiff and defendant arose only because plaintiff refused to abandon her lawsuit v. the said Trust and to permit defendant to abandon same (with prejudice).

TWENTY-SECOND: The defendant's initiation of the scheme of abandoning the plaintiff's case arose because of his lack of understanding of applicable law as follows:

A. Defendant's total incompetence as a member of the bar, and as a litigator in strict products liability and his total lack of knowledge of the basic concepts of that field, and his failure to do any adequate research into the developments in that field of law since 1975 and to the present, and his failure to know and apprise himself of appropriate tactics generally of a litigator and trial lawyer.

B. Upon Information and Belief that defendant maintained and still maintains a close relationship with Paul Strain, Esq., an attorney for defendant Trust, which is inimical to his being able to serve plaintiff faithfully as a client, which resulted in his performance for his client being a species of divided loyalty to the gross prejudice of client's rights and interests.

TWENTY-THIRD: Heretofore and during pendency of plaintiff's action v. Dalkon Shield Claimants Trust the said Trust offered plaintiff a settlement of $93,000.00 in damages.

TWENTY-FOURTH: At that time the instant defendant urged plaintiff to decline the offer stating that he would achieve a result on behalf of plaintiff equaling or exceeding $500,000.00 and accordingly plaintiff rejected the offer relying upon defendant's advice and said offer expired according to its term.

TWENTY-FIFTH: Defendant at all times failed to understand the following matters of law which the average competent practitioner would have known.

(1) That in products liability the plaintiff need not show in order

to prevail that the product defect was the sole cause of plaintiff's injury but only "a" cause thereof;

(2) that in products liability cases for any action or event to serve successfully as a contributory cause it must be the sole cause of plaintiff's injury: defendant's total failure to understand the law in this regard is shown in a letter to plaintiff dated September 30, 193 [sic] in which he said Chlamydia Trachomatis "was significantly involved because it weakened your fallopian tubes and rendered them susceptible to bacterial salpingitis, and thereby proximately produced your 1979 infection and surgery"; (emphasis added)

(3) that the defendant's failed properly to plead the existence of any claimed contributory cause (Chlamydia or other) and failed to raise any such matter as an issue;

(4) that the presence or absence of Chlamydia Trachomatis or any other disease organism, sexually transmitted or otherwise, except for E Coli which was the sole pathogen found in plaintiff's body, and was the sole pathogen discovered therein, is irrelevant on the trial of this cause;

(5) that defendant's answer up to the time defendant withdrew contained no affirmative defense or other allegation properly alleging Chlamydia Trachomatis or any other disease bearing organism and that any purported pathogen other than E Coli would not be admissible on trial except for the purpose in sub paragraph (7);

(6) that the presence or absence of Chlamydia Trachomatis would not be admissible to show that plaintiff's resistance to E Coli or other pathogens was lowered by the presence of Chlamydia Trachomatis (See letter of 9/30/83 supra);

(7) That the only manner in which the presence of Chlamydia Trachomatis would become relevant and material would have been on plaintiff's offer to prove that the Dalkon Shield was defective because of the failure of Robins to warn physicians (and/or users) that the use of the Dalkon Shield was counter indicated in the presence of Chlamydia or any other sexually transmitted disease;

(8) That the nature of the pathogen which ascended the DS tail string was immaterial, as long as its ascent was caused or facilitated by the presence of the said Dalkon Shield and its defective tail string;

(9) That defendant would not have been entitled to a discovery order commanding plaintiff to give blood for a Chlamydia titer because the presence or absence of Chlamydia Trachomatis was not a matter "in issue" in plaintiff's Dalkon Shield case and was not raised by the pleadings;

(10) That under and by virtue of the holdings of Fitzpatrick v. A.H. Robins Co., Inc., 126 AD 2d 513, 510 N.Y.S. 2d 632 (App. Div., 2d Dept), Tetuan v. A.H. Robins Co., Inc., 241 Kan 441, 738 Pac 1210 (Supreme Court of Kansas, and cases cited therein, Palmer v. A.H. Robins Co., Inc., sitting En Banc and cases cited therein and Hawkinson v. A.H. Robins Co., Inc., 595 F Supp 1290 (U.S. District Court Colorado), A.H. Robins Co., Inc., and Dalkon Shield Claimants Trust by virtue of collateral estoppel were and are precluded from raising any issues in plaintiff's case against the Trust except the amount of damages;

(11) That the titers voluntarily suffered as a result of plaintiff's importunity, which importunity resulted from his ignorance of the applicable law, and of the applicable law of science showed at best a vague negative for Chlamydia Trachomatis, or any other Chlamydia species, except for Chlamydia Pneumoniae, as to which there was some indication that plaintiff had suffered pneumonia at some indeterminate time in her life, a disease carried by contact with human spittle;

(12) That plaintiff did in fact suffer three bouts of pneumonia during her early life, and advised defendant of that fact;

(13) The Claimants Resolution Facility adopted by order of the Bankruptcy Court and the U.S. District Court for the Eastern District of Virginia provides:

(13) Causation. Causation will be in issue except as waived by the Trust. However, the Trust shall at all times, consistent with its purposes, minimize the intrusion into such private matters as the users' frequency of sexual relations, number of sex partners, age of onset of

intercourse, sexual practices and the like.

(14) Defendant DS Trust at depositions of plaintiff, of Richard Fulfree, husband, of plaintiff's two children, of plaintiff's former husband, asked almost entirely questions prohibited by the CRF, questions designed to humiliate and discourage plaintiff and to destroy her reputation, and to dub her as a woman devoted to meretricious pursuits: this defendant and/or his duly designated associate, either through incompetence or disloyalty failed to object and failed entirely to understand that it was their duty to object; the impact of this behavior was that defendant injured plaintiff by permitting the Trust to import into this case a total non-issue with which he left plaintiff to cope at trial.

(15) Defendant also failed to understand that under governing law a defendant takes a plaintiff as defendant finds him and cannot be heard to urge that plaintiff is weaker or less resistant to trauma or infection, and it is not a defense or a fact in mitigation of damages that plaintiff is weaker than other persons and is more easily injured or less resistant to disease. (See letter of September 30, 1993, supra)

(16) Defendant failed to understand that the corporate shield is not effectual in tort cases to protect officers, directors and employees of a corporation who join with the corporation in tortious activity, or perform tortious acts on behalf of a corporation, and therefore negligently failed to join the various individuals who jointly with corporation committed the various torts defined as strict product liability, fraud and negligence.

TWENTY-SIXTH: In June 1993 defendant induced plaintiff to undergo a test for Chlamydia having been induced to make that request by Paul Strain, Esq., an attorney for defendant Trust and defendant and plaintiff agreed that the tests were to be for the purpose of analyzing plaintiff's case and for no other purpose and that they were not to be disclosed to the Trust or to anyone else.

TWENTY-SEVENTH: Plaintiff underwent several titers for the above purpose and with results set forth above.

TWENTY-EIGHTH: Defendant then, erroneously believing the tests to be harmful to plaintiff's case, disclosed the results to Paul Strain,

Esq., counsel to defendant without seeking plaintiff's permission so to do, and without plaintiff's knowledge.

TWENTY-NINTH: Said Paul Strain, Esq. on or about November 20, 1993 wrote a letter to District Judge Keenan stating, "Mr. Manchester reported to me (Strain) orally on September 13 that an antibody titer showed evidence of a previous Chlamydia infection."

THIRTIETH: From that time forward, either through disloyalty, incompetence or both, defendant urged with great importunity 1. that plaintiff sign a stipulation prepared by Strain, Esq. agreeing to the results of the titers and that they validly showed that plaintiff had Chlamydia Trachomatis and also subsequently plaintiff execute a stipulation of discontinuance.

THIRTY-FIRST: At one of these sessions defendant stated very openly that plaintiff should "sit down with Richard (Fulfree) and a bottle of wine and bare your lives to each other" meaning to imply that we had then been guilty of infidelity, each to each other, and that therefore plaintiff's case against the Trust was valueless.

THIRTY-SECOND: It was only after it became clear to him that plaintiff would not sign either stipulation and would not abandon the case as he wished plaintiff to do, that he made his motion to withdraw from plaintiff's case, which motion was granted.

THIRTY-THIRD: Upon the withdrawal of defendant from plaintiff's case against the Trust, plaintiff's new and present counsel wrote to defendant demanding that defendant forward all documents relating to plaintiff's case against the Trust, including all depositions taken dealing with plaintiff's case.

THIRTY-FOURTH: On February 17,1995 defendant wrote to Mr. Fulfree, plaintiff's present counsel, a response in which he stated that he had conducted no discovery of any kind in plaintiff's case and indicated that his intent was to rely on discovery and depositions made by other counsel on behalf of other plaintiffs while A.H. Robins was still the defendant before the Chapter 11 bankruptcy.

THIRTY-FIFTH: By said statement defendant admitted that the discovery made in the multi-district litigation and discovery made on behalf of other plaintiffs in other cases concerning the Dalkon Shield would be relied on by him at trial as a necessary part of plaintiff's case against the Trust

THIRTY-SIXTH: Defendant declined and refused to send plaintiff's counsel copies of all such discovery which he deemed to be part of, and essential to the presentation of plaintiff's case.

THIRTY-SEVENTH: Moreover, defendant did not trouble to describe the documents upon which he had intended to rely, in the trial of plaintiff's case, if ever that trial had taken place, by caption, by names of the various plaintiffs, the date taken, the names of the attorneys involved, the name of the person who uttered or created such document, whether they were in the document depository or in the files of different attorneys or clerks of court, the content of the various documents, their nature and relevancy to plaintiff's case as defendant conceived them.

THIRTY-EIGHTH: Therefor on February 17, 1995 plaintiff was left with a file which to all intents and purposes was vacant of useful information except for some, but not all of the pleadings and depositions taken by defendant of plaintiff and her witness, conducted by the Trust, and items of correspondence.

THIRTY-NINTH: The plaintiff's counsel, upon entry into the case was made aware that the trial date was November 6, 1995.

Fortieth: Faced with the necessity of getting useful information of some sort on behalf of plaintiff, plaintiff's new attorney prepared and served on April 18, 1995, a set of 600 plus interrogatories to the attorneys for the Trust: those interrogatories have never been answered.

FORTY-FIRST: A conference was thereon held by and before Hon. William C. Conner, District Judge, at which time plaintiff's counsel was directed to "cull" the matters and endeavor to make them less voluminous and to divide them between interrogatories and requests to admit.

FORTY-SECOND: That at that conference plaintiff's counsel made clear that he was then in progress of preparing a motion addressed to the defects in the Trust's answer, and for summary Judgment against the Trust.

FORTY-THIRD: Thereafter and on March 23, 1995 plaintiff served interrogatories and requests to admit which totaled slightly more than one-half the inquiries in the original set of interrogatories.

FORTY-FOURTH: On or about April 10, 1995 plaintiff's counsel received objections to both the interrogatories and requests to admit, and failing to address the question of why any individual interrogatory or request was unlawful and unauthorized.

FORTY-FIFTH: There were then five other conferences held, one on March 30, 1995 with Judge Conner, one on June 8, 1995 with Judge Conner, and one on July 28, 1995 with Judge Conner and one on July 28, 1995 with Magistrate Lisa M. Smith and one on August 3, 1995 with Magistrate Smith.

FORTY-SIXTH: The results of the conferences as of the date hereof are:

(a) Plaintiff has not received proper and lawfully adequate responses to either type of discovery which are the only types permitted by the Claimants Resolution Facility.

(b) That plaintiff has been told at conferences that all inquiries concerning documents need not be answered despite the fact that plaintiff may not under the CRF serve requests to produce documents.

(c) Plaintiff was ordered by Judge Conner to complete all discovery, before making a motion addressed to the pleadings and a concurrent motion for summary judgment.

(d) Defendant, Trust, has made a motion in Bankruptcy Court to interpret CRF and to limit plaintiff's discovery, despite the fact that the case against the Trust has been duly certified for trial in the Southern District of New York, and that the matter of that interpretation was duly

addressed by the said Southern District of New York, and that the motion in the Bankruptcy Court in Virginia is still pending causing yet further delay to that already suffered by plaintiff.

(e) That at a conference held on July 28, 1995 Magistrate Lisa M. Smith gave the Trust until August 17, 1995 to answer the plaintiff's interrogatories and requests to admit, although the history of the litigation mandates the conclusion that the Trust's compliance will be at best perfunctory, and at the same time Magistrate Smith declined to delay the trial date beyond the previously fixed date of November 6, 1995.

FORTY-SEVENTH: Thus because of defendant's sloth, lack of skill, and failure to give the plaintiff his undivided loyalty, plaintiff is placed in the position of going to trial November 6, 1995 without having been permitted meaningful discovery, and without having had time properly to examine the fruits thereof, and to prepare for trial and without having had time to prepare and have decided before November 1995 of the essential motion addressed to the Trust's invalid, and even colorable defenses, and addressing the matter of summary judgment based upon collateral estoppel, stare decisis and the failure of the Trust and/or A.H. Robins Co., Inc. to raise any justiciable facts in issue.

FORTY-EIGHTH: That by reason of defendant's gross negligence and disloyalty, and because of defendant's delay and lack of skill, plaintiff has been deprived of her lawful and compensatory damages in the amount of $1,570,000.00 and of proper punitive damages in the amount of $3,750,000.00.

FOR A SECOND CAUSE OF ACTION

FORTY-NINTH: That on December 20, 1991 defendant wrote to plaintiff's attorney regarding disbursements allegedly made by him in the amount of $31,500.00.

FIFTIETH: That on September 16, 1994 defendant sent to plaintiff's attorney the same list of disbursements in the same amount.

FIFTY-FIRST: That even had the defendant had had a valid claim for disbursements, the said claim would have been waived by his having

made a motion to withdraw without any mention of disbursements and any prayer that he be allowed the same.

FIFTY-SECOND: That plaintiff, upon Information and Belief, is not indebted to defendant in any amount:

(1) Since the agreement retaining defendant provided: "Expenses incurred in your individual case will be deducted from the gross settlement at the time of disbursement" and defendant voluntarily retired from the case before he had achieved a Judgment or a settlement, "gross" or other, and had not performed any act capable of creating a fund from which money could be disbursed.

(2) Since to a large extent the alleged disbursements are spurious, not having been made, and not haying been made on plaintiff's behalf and since they are not, to a large extent expenses appropriate to law , to be borne by plaintiff, and which, upon information and belief, were actually paid by defendant Trust.

FIFTY-THIRD: On or about July 29, 1995 plaintiff's attorney received a letter from Downs, Rochlin and Martin, P.C. demanding payment of $34,699.46 and threatening to go to arbitration to collect the same.

FIFTY-FOURTH: Section 487 of the Judiciary Law of the State of New York provides as follows:

§ 487. Misconduct by attorneys

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed

therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Added L.1965, c. 1031, § 123. (Emphasis added)

FIFTY-FIFTH: That the application by defendant for leave to withdraw from the case was false and untrue as hereinabove set forth in paragraphs "16th" and "17" hereof.

FIFTY-SIXTH: That by said statement deceived both the court and the plaintiff.

FIFTY-SEVENTH: As is shown heretofore defendant deliberately delayed preparing and trying the case against the Trust and against A.H. Robins Co., Inc., the original defendant, for more than 13 years from the date defendant was retained for no purpose related to plaintiff's welfare but for purposes of his own as shown by all of the foregoing allegations and delayed the same until after the A.H. Robins Chapter 11 bankruptcy.

FIFTY-EIGHTH: That such delay is a misdemeanor, and commands that treble damages be assessed against the attorney in favor of his client for the damages occasioned by such delay.

FOR A THIRD CASE OF ACTION

FIFTY-NINTH: That defendant said to plaintiff and represented to plaintiff that he was an expert in the fields of products liability and negligence and was endowed with great skill therein and defendant intended plaintiff to rely upon said statement.

SIXTIETH: That plaintiff believed the said representations and in reliance thereon retained defendant and entered into an agreement of retainer, retaining the defendant as her counsel to bring suit based upon her injuries suffered as a result of her having worn the Dalkon Shield.

SIXTY-FIRST: That plaintiff said representations were false, and known by him to be false: that defendant was not in fact an expert in the fields mentioned above and was ignorant of all of the basic principals

thereof as is shown in paragraph Twenty-Fifth hereof.

SIXTY-SECOND: Any reasonably competent lawyer, not an expert in this field, would have found Fitzpatrick v . A.H. Robins Co., Inc. in less than an hour's research, and the other three cases cited above in not more than 2 additional hours: that in those four cases he would have discovered the existence of his ignorance and the means of correcting his gross errors.

SIXTY-THIRD: That the plaintiff was damaged as a result of said misrepresentations in the manner set forth in paragraphs "Forty-Seventh" and "Forty-Eighth" and in other paragraphs hereinabove set forth, and by the misrepresentation contained in defendant's motion to withdraw from plaintiff's case by the fact that plaintiff will be required to defend a worthless action by defendant to recover disbursements, which would have been extinguished if the true facts had been disclosed.

SIXTY-FOURTH: That all of the misrepresentations made by defendant as hereinabove described were made to deceive the plaintiff and plaintiff believed the same, and acted in reliance thereon.

SIXTY-FIFTH: That plaintiff was damaged by the said representations and her reliance thereupon as hereinabove set forth.

WHEREFORE plaintiff demands judgment against defendant for the sums she would have recovered against A.H. Robins Co., Inc. in the amount of $1,570,000.00 in compensatory damages and $3,750,000.00 in punitive damages, and $5,000.00 as the reasonable cost to plaintiff of defending against defendant's imminent suit for disbursements, and the amounts named above in this prayer be tripled in accordance with the provisions of §487 of the Judiciary Law plus costs and disbursements and such other and further relief as the court deems proper in the premises, including punitive damages against the defendant on account of his malpractice and breach of his duty of fidelity.

Dated: Yonkers, New York
August 15, 1995

Yours etc.,

RICHARD W. FULFREE
Attorney for Plaintiff
612 E. Grassy Sprain Road
Yonkers, New York 10710
(914) 961-7500

LISMAN & LISMAN
ATTORNEYS AT LAW
101 COLLEGE STREET
BURLINGTON, VERMONT 08402

June 15, 1981

Ellen Surlak
115 Bennett Avenue
Yonkers, NY 10701

Dear Ellen:

You have asked my office to initiate an investigation on your behalf and thereby seek to prove that the Dalkon Shield IUD has caused you medical injuries and complications. You have furnished my office with medical authorizations and names and addresses of health care organizations and professions whom we have contacted to obtain copies of medical records. We now have copies of those records listed on the attached page.

Based on examination of your records and the information you have furnished, my opinion is you have a proper claim to make against, the A.H. Robins Company, Inc., the manufacturer of the Dalkon Shield. I believe initiation of a claim and lawsuit will result in a successful recovery for you. In my opinion, your recovery will substantially exceed any expenses which may by incurred in the preparation of your case. Based on the value of settlements and verdicts in similar claims against the A.H. Robins Company and the extent and nature of your injuries, I also will seek punitive damages for you, I expect to recover adequate compensation for you which, may also be available in your case.

As a result of other cases and claims I have handled against the A.H. Robins Company, I believe suit should be filed promptly in your jurisdiction so that further delay is avoided insofar as the statute of limitations is concerned. We can expect the A.H. Robins Company to raise a statute of limitations defense in your case, as it does now in practically all cases, although I believe the law of your jurisdiction will permit you to proceed with your claim against the manufacturer.

In my earlier letter to you I described our fee schedule, but I would like to state it again for you so you may ask me any questions that you may have. I will agree to represent you on the basis of a contingent fee agreement. This means you owe me no attorneys' fees whatsoever unless a successful recovery occurs in xxx matter. If settlement results before or upon the filing of the suit but before substantial trial preparation in your individual case, then the contingent fee will be one third of the gross recovery. If we are required to begin substantial trial preparation for your individual case, then the contingent fee basis will be forty percent of the gross recovery. If an appeal is required, then you and I will reserve the right to negotiate a fee for that appeal.

Expenses incurred in your individual case will be deducted from the gross settlement at the time of disbursement. I will keep you periodically informed of all such expenses but do not believe they will be large unless I am require to actually try your case. The trial in some cases has taken over three months, but we expect our current trial preparation for all clients to reduce substantially the length of trial in your case. Nevertheless, we must be prepared for a lengthy trial since Robins' tactics include attempting to tire and wear out the plaintiffs.

In addition to the individual expense, in case of settlement or verdict, we will also expect you, (as we have all individual Dalkon Shield clients), to bear a portion of the group expenses. These expenses relate to the research which we have conducted at MIT, Harvard and other facilities. This amount will vary, based upon both the numerator and denominator of my individual cases at the time of settlement. At present each client's group expense has amounted to $2,000. I expect in the future this amount will not substantially increase and may well decrease.

Dalkon Shield cases like yours require careful preparation and investigation. I will retain total control of your case and will be lead counsel at time of trial. I will, however, want to obtain the assistance of a competent and qualified attorney in your state to assist with matters of a local nature. I may also have one of my co-counsel in the IUD recall case in Boston participate. Such attorneys, to the extent they are involved in your case, will be paid by me, and you will have no further legal fees or expenses as a result. Nevertheless, in my best judgment, the assistance of such other attorneys will enhance the settlement value or jury verdict of

your case.

I would like to place your case in suit in the near future in Federal Court in your state. If you have any questions or concerns with regard to this letter, I would be happy to speak with you at your convenience.

For my files, I would appreciate your signature, indicating your acceptance of this letter proposal and your request for me to commence a lawsuit as described above on your behalf. I will look forward to hearing from you and would appreciate your returning this letter to me at your earliest opportunity. A copy of the letter is enclosed for your file.

Very truly yours,

Robert E. Manchester

I accept the terms of this letter proposal and request that you commence a lawsuit on my behalf as described in this letter.

Date: June 24, 1981 [signed] Ellen P. Surlak

VERMONT-BURLINGTON MARTINDALE-HUBBLE DIRECTORY
1993

MANCHESTER LAW OFFICES
PROFESSIONAL CORPORATION

ONE LAWSON LANE
P.O. BOX 1459
BURLINGTON, VERMONT 05402-1459
Telephone.- 802-658-7444
FAX. 802-658-2078

Personal Injury, Products Liability, Dalkon Shield IUD Personal Injury Litigation, Wrongful Death, Insurance Bad Faith, Professional Malpractice and Commercial and Environmental Litigation.

FIRM PROFILE: Manchester Law Offices focuses its practice on representing plaintiffs in large and complex cases. We have recently been successful litigating cases involving environmental clean-ups, products liability (including the Dalkon Shield), medical malpractice and insurance bad faith issues. We welcome cases that involve challenging, complex or untried issues.

ROBERT F. MANCHESTER, born Richmond, Virginia, November 1, 1944; admitted to bar, 1969, Colorado; 1970, Vermont and U.S. District Court, District of Vermont; 1973, U.S. Court of Appeals, 2nd Circuit; 1974, U.S. District Court, Northern District of New York; 1984, U.S. Court of Appeals, 4th Circuit; 1985, U.S. Court of Appeals, 10th Circuit. Education: Brown University (A.B., 1966); University of Colorado (J.D., 1969). Co-editor: "Bad Faith Law Update," Mathew Bender, 1986-1989. Author: "Consequential and Punitive Damages Arising out of Breach of Insurance Contract," Vermont Bar Journal, April, 1979. Contributor and Author: "Long Term Effects of IUDs - Problems of Proof," The Association of Trial Lawyers of America ("ATLA") 1983 Annual Convention Reference Materials; "Third Party Bad Faith Actions," TRIAL, August, 1984; "Successful Computer Application," TRIAL, January, 1989; "Getting the Most from Your Personal Computer Wording Processing System," TRIAL, January, 1990; "Law Office Organization in the Computer Age," TRIAL, 1991. The ATLA Press Series:

"Wrongful Death Litigation" review of wrongful death and survival statutes and related problems of proof; ATLA 1984 Boston, MA seminar; "Punitive Damages and Injunctive Relief for Failure to Recall a Defective Product," Vermont Bar Association: "Remedies for Breach of Insurance Contract;" A 1987 Update; "Consequential and Punitive Damages Arising out of Willful Breach of Insurance Contract," (1987); "Determining and Proving Damages,"(1987); Vermont Trial Lawyers Association" Presentation of Economic Loss in Personal Injury Action; Techniques for the Trial Lawyer and Trial Demonstration," (1988); "The Social and Economic Consequences Produced by the Delayed Recall of the Dalkon Shield," Product Liability Law Review, Vol. 1, Issue 1 (1988); Vermont Bar Association and Vermont Law School: "Federal Practice in Vermont; Ten Under-Utilized Discovery Techniques (1989); National Business Institute: "Trial Advocacy in Vermont; Techniques for Successful Direct and Cross Examination in Civil Cases (1989). Plaintiffs' Trial Counsel, In re Dalkon Shield Personal Injury Litigation, MDL-211, 1980-1985. Co-Chair, Dalkon Shield Claimants' Committee, In re A.H. Robins Company, Inc., Chapter 11 proceedings (1985-1986). Listed, Best Lawyers in America, 1989-1990, 1991-1992. Member: Vermont (Chairman: Committee on Jury Panel Instructions, 1972-1975; Tort Law Section, 1976-1979; Vice-Chairman, Consumer Law Section, 1975-1976) and American (Member, Litigation Section) Bar Association; Vermont Trial Lawyers Association (CLE Programs Chair, 1987-1989; Member, Board of Governors, 1991); The Association of Trial Lawyers of America (State Committeeman, 1976-1978; 1988-; Member: Board of Governors, 1978-1985; Products Liability and Medical Malpractice Exchange Committee, 1983-1985; Key Man Committee (renamed, Political Outreach Steering Committee), 1985-1988; Public Affairs Committee, 1987-1989); Pre-Trial and Discovery Abuse Commission Subcommittee, 1989-1989; Co-Chair, Computer Use Committee, 1988-); Trial Lawyers for Public Justice (Sustaining Founder; Member, Board of Directors 1984-1989). Lifetime Fellow, The Roscoe Pound - American Trial Lawyers Foundation. Certified as a Civil Trial Advocate by the National Board of Trial Advocacy. REPORTED CASES: Cavanaugh vs. Abbott Laboratories, 145 Vt. 516. 496 A.2d 154 (1985); Gerrish Corp. vs. Universal Underwriters Insurance Co., 745 F.Supp 358 (D.Vt. 1990), aff'd. 947 F.2d 1023 Phillips vs. Aetna Life Ins. Co., 473 F.Supp. 994 (D.Vt. 1979).

PATRICIA S. ORR, born Long Beach, California, September 19, 1954, admitted to bar, 1982, New York; 1983, U.S. District Court, Eastern and Southern Districts of New York; 1986, New Jersey, U.S. District Court Northern District of New York and District of New Jersey; 1990, Vermont and U.S. District Court, District of Vermont; 1991, U.S. Court of Appeals Second Circuit. Education: Elmira College (B.S., summa cum laude, 1976); Fordham University (J.D., 1981). Phi Beta Kappa. Member: Vermont and American Bar Associations; The Association of Trial Lawyers of America. REPORTED CASES: Republic National Bank of New York v. Eastern Airlines, Inc. 815 F.2d 232 (2d Cir. 1987).

LEGAL SUPPORT PERSONNEL

LEGAL NURSE CONSULTANTS

TINA L MULVEY, born Takoma Park, Maryland, August 10, 1956. Education: Southern College (A.S., with honors, 1976); Johnson State College (B.S., with honors, 1990). Registered Nurse, Vermont. Member: American Association of Legal Nurse Consultants (Vermont Chapter, 1992); Vermont Paralegal Association; The Association of Trial Lawyers of America.

ROSEMEREYL S. HARPLE, born Ridgewood, New Jersey, December 22, 1951. Education: Skidmore College (B.S., in Nursing, with honors, 1974); Champlain College. Member, Periclean. Registered Nurse, Vermont, 1976. Member: American Association of Legal Nurse Consultants, (Secretary, Vermont Chapter, 1991-1992); Vermont Paralegal Association; The Association of Trial Lawyers of America. CONCENTRATION: Dalkon Shield Administration.

MAUREEN P. TREMBLAY, born Bayshore, New York, December 20, 1951. Education: Mount Wachusetts Community College (A.S., with honors, 1976); Johnson State College. Registered Nurse, Massachusetts, 1976 and Vermont 1987. Member: American Association of Legal Nurse Consultants, (President, Vermont Chapter, 1992); Vermont Paralegal Association; The Association of Trial Lawyers of America. CONCENTRATION: Dalkon Shield Administration.

[marked] Exhibit C

SOUTHERN DISTRICT OF NEW YORK

ELLEN FULFREE
115 Bennett Avenue
Yonkers, New York 10701,

Plaintiff

v.

DALKON SHIELD
CLAIMANT'S TRUST
Richmond, Virginia
Defendant

Index #81 CV 5116

MOTION TO WITHDRAW

Manchester Law Offices, P.C., attorneys for the Plaintiff in this action, respectfully requests leave of this Court to withdraw as the attorney of record on behalf of the Plaintiff.

1. In light of the communications between myself and the Plaintiff, it is my opinion that I cannot appropriately represent her in this case, and accordingly should withdraw. In a motion like this, a lawyer seeking to withdraw is necessarily constrained from advising the Court of the nature of the circumstances which led to the lawyer's request to withdraw. See Disciplinary Rule 2110. Nonetheless, I can represent to the Court that my decision involve irreconcilable differences regarding the proper management of this litigation.

2. Based upon correspondence with the Plaintiff, the client knowingly and freely assents to the termination. The Plaintiff has not yet retained new counsel, however her husband, Richard W. Fulfree has advised that he will handle the litigation in the interim.

Dated at Burlington, Vermont this 6th day of January, 1994.

MANCHESTER LAW OFFICES, P.C.

By: [signed] Robert E. Manchester
Robert E. Manchester
Attorney for Plaintiff
P.O. Box 1459
Burlington, Vermont 05402
(802) 658-7444

cc: Paul Strain, Esq.
Ellen P. Fulfree
Richard W. Fulfree, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ELLEN P. FULFREE,

Plaintiff,

-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

AMENDED
NOTICE OF REMOVAL

Docket No. 95-13051

Defendants.

----------x

Defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES hereby file pursuant to the Order of Judge Denny Chin dated January 2, 1996 [copy attached hereto as Exhibit "B"] this Amended Notice of Removal of the above-described action to the United States District Court for the Southern District of New York, 40 Foley Square, New York, New York 10007 from the Supreme Court of the State of New York, County of Westchester, where the action is now pending, as provided by Title 28, U.S.C. Chapter 89, and state:

1. This cause was commenced in the Supreme Court of the State of New York, County of Westchester by filing of a Summons and Complaint on or about August 15, 1995, and process was served upon removing defendants on August 23, 1995. A copy of plaintiffs complaint is annexed hereto as Exhibit "A".

2. The action is a civil action for compensatory damages based upon alleged lawyer malpractice.

3. The ground for removal is that diversity jurisdiction exists, as there is complete diversity of citizenship and the amount in controversy exceeds the sum or value of $50,000.

4. Plaintiff contends this matter in dispute exceeds the sum of fifty thousand dollars ($50,000) exclusive of interest and costs.

5. At the time of commencement of this action, plaintiff was a citizen of New York and resided at 115 Bennett Avenue, Yonkers, New York. Defendant MANCHESTER LAW OFFICES is a citizen of Vermont, is deemed to have a residence at One Lawson Lane, Burlington, Vermont 05401, is incorporated only in Vermont, and has a principal place of business only in Vermont at the above address. Defendant ROBERT MANCHESTER is a citizen only of Vermont and resides at 5 Pond Road, Shelburne, Vermont 05482.

6. A copy of all pleadings, process, and orders served upon defendants upon commencement of this lawsuit is filed with this Amended Notice.

7. Defendants will give written notice of the filing of this Amended Notice as required by 28 U.S.C. Section 1446(d).

8. A copy of this Amended Notice will be filed with the Clerk of the Supreme Court of the State of New York, County of Westchester, as required by 28 U.S.C. Section 1446(d).

9. The original notice of removal was filed within thirty days after the receipt by defendants of a copy of the initial pleading setting forth the claim for relief upon which the action is based. 28 U.S.C. Section 1446(b). This Amended Notice is being filed with leave of Court, pursuant to the Order of Judge Denny Chin dated January 2, 1996 [copy attached hereto as Exhibit "B"].

WHEREFORE, defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES respectfully request that this action proceed in this Court as an action properly removed to it.

Dated: January 6, 1996
New York, New York

Respectfully submitted,
KOPFF, NARDELLI & DOPF

By: [signed] Martin B. Adams
MARTIN B. ADAMS
Attorneys for Defendants
440 Ninth Avenue
New York, New York 10001
(212) 244-2999

TO: RICHARD W. FULFREE, ESQ.
Attorney for Plaintiff
612 East Grassy Sprain Road
Yonkers, N.Y. 10710

KOPFF, NARDELLI & DOPF
COUNSELLORS AT LAW
440 NINTH AVENUE
NEW YORK, NEW YORK 10001-1688
(212) 244-2999
Telecopier: (212) 643-0862

February 1, 1996

Richard W. Fulfree, Esq.
Treetops Carriage House
612 East Grassy Sprain Road
Yonkers, N.Y. 10710

Re: Fulfree v. Manchester
Docket No. 95 Civ. 7723 (DC)
Our File No. 69-01

Dear Mr. Fulfree:

Receipt is acknowledged of plaintiff's Notice of Appeal. The Order of Judge Chin is an interlocutory order from which there is no right of immediate appeal. Please withdraw your Notice of Appeal.

Also, now that your motion to remand has been adjudicated, please serve an answer to defendants' counterclaim. Thank you for your attention to this matter.

Very truly yours,

KOPFF, NARDELLI & DOPF

By: [signed] Martin B. Adams
MARTIN B. ADAMS

KOPFF, NARDELLI & DOPF
COUNSELLORS AT LAW
440 NINTH AVENUE
NEW YORK, NEW YORK 10001-1688
(212) 244-2999
Telecopier: (212) 643-0862

March 11, 1996

Richard W. Fulfree, Esq.
Treetops Carriage House
612 East Grassy Sprain Road
Yonkers, N.Y. 10710

Re: Fulfree v. Manchester
Docket No. 95 Civ. 7723 (DC)
Our File No. 69-01

Dear Mr. Fulfree:

The Order of the United States Court of Appeals for the Second Circuit dated March 1, 1996 grants plaintiff's motion only insofar as dismissal for failure to file Forms C and D is vacated. However, your application to treat your appeal as a mandamus application was not granted and, as discussed in prior correspondence, the Order of Judge Chin is an interlocutory order from which there is no right of immediate appeal.

Accordingly, I respectfully request that plaintiff withdraw her appeal, to avoid the need for judicial intervention. Thank you for your attention to this matter.

Very truly yours,

KOPFF, NARDELLI & DOPF

By: [signed] martin B. Adams
MARTIN B. ADAMS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
ELLEN P. FULFREE,

NOTICE OF MOTION
FOR REMAND TO SUPREME
COURT-WESTCHESTER COUNTY

Plaintiff,

-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Index No. 95-13051
Judge Assigned:
HON. DENNY CHIN

Defendants.
----------x

S I R S :

PLEASE TAKE NOTICE that upon the Statement of RICHARD W. FULFREE, the attorney of record herein, duly signed by him on the 2nd day of October, 1995 and upon the affidavit of ELLEN P. FULFREE, duly sworn on the 29th day of September 1995 and upon the pleadings and proceedings heretofore had herein, the plaintiff hereby moves this Court at a term thereof on the 20th day of October, 1995 at 40 Foley Square, New York, New York 10007 for an order remanding this cause to the Supreme Court, Westchester County, despite the Notice of Removal heretofore served by defendant and granting such other and further relief as the Court deems proper in the premises.

Dated: Yonkers, New York
October 2, 1995

Yours etc.,

[signed] Richard W. Fulfree
RICHARD W. FULFREE (1268)
Attorney for Plaintiff
612 E. Grassy Sprain Road
Yonkers, New York 10710
(914) 961-7500

TO: KOPFF, NARDELLI & DOPF, ESQS.
Attorneys for Defendants
440 Ninth Avenue
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
ELLEN P. FULFREE,

STATEMENT IN SUPPORT OF MOTION TO REMAND

Plaintiff,

-against-

Index No. 95-13051

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Judge Assigned:
HON. DENNY CHIN

Defendants.
----------x

RICHARD W. FULFREE shows to the Court and alleges:

I am the attorney of record for plaintiff in the above entitled matter, and make this statement in support of a motion to remand this case to the Supreme Court Westchester County, in which Court this case was commenced by plaintiff and from which it has been moved by defendant's notice of removal.

The notice of removal bears date of September 6, 1995 and shows a date of filing in the United States District Court, Southern District of New York on September 7, 1995. It removes the case from Supreme Court, Westchester County "to the United States District Court for the Southern District of New York, 40 Foley Square, New York, New York 10007". The notice of removal was received by me in the mail on September 18, 1995. A true copy of the notice of removal is annexed hereto and marked Exhibit 1 hereof.

The notice of removal is defective upon a number of grounds which are

set forth below. No cases will be cited herein, but the cases, statutes and rules sustaining plaintiff's position will be set forth in a memorandum of law to be filed herein or shortly hereafter.

1. The notice of removal says: "Defendant Manchester Law Offices is deemed to have a residence at One Lawson Lane, Burlington, Vermont 05401." The law requires that both the State of incorporation and the address of the corporation's principal place of business be set forth. No state of incorporation is set forth and a place where the corporation "is deemed" to have a residence is not the required statement revealing the address of the corporation's principal place of business.

2. The law requires that the notice of removal be signed by the "attorney of record". This notice of removal is signed as follows:

"Respectfully submitted,
KOPFF, NARDELLI & DOPF
By
MARTIN B. ADAMS
Associated with the Firm
Attorneys for Defendants
40 Ninth Avenue
New York, New York 10001
(212) 244-2999

Someone who is merely "Associated with the Firm" is not the attorney of record and is no part of the attorney of record. Even a partner who signs in the manner in which Mr. Adams has signed here fails to comply with the statute. Such a partner is required to place his own veracity on the line and not that of his firm. This follows inevitably from the fact that Rule 11 provides for such an unsworn signature to serve the function traditionally served by an oath taken before a judge or a notary public. Kopff, Nardelli & Dopf, Esq. have not put their veracity on the line, and mechanically could not do so. Rule 11 requires that one of the partners sign and thus expose himself to sanctions in the event an untruth or other wrong or defect eventuates.

3. The statute requires that a notice of removal set forth the district and division to which removal is sought to be removed. Here the

White Plains Division is where plaintiff would be entitled by law to have this case tried, if it were in federal court. More important, the White Plains Division of the Southern District is where the state action was pending. This notice of removal fails to state the White Plains Division of the Southern District of New York but affirmatively designates 1140 Foley Square, New York, N.Y. 10007". The writer hereof has communicated with the Clerk's Office in Federal Court, White Plains, which assured him that the White Plains Courthouse and its judges and employees constitute a Division of the Southern District of New York. The notice of removal in its paragraph 5 states that plaintiff resides at 115 Bennett Avenue, Yonkers, N.Y. This alone establishes that plaintiff would be entitled as a matter of law to have a Federal case, in which she is plaintiff, tried in White Plains. Foley Square is not the place where such a Federal Place would be tried. The law requires that a notice to remove shall be filed in the district and division where the state action is pending. In this case the state action was brought in Supreme Court, Westchester County, which is located a few hundred yards from the White Plains Division of the Southern District of New York.

4. The policy of the law, as set forth in the Federal cases, is strongly against removal from state courts, and the burden of proof and of persuasion rests upon the party, removing the case, to prove that the facts justify removal exist and that the papers (notice of removal) comply in every respect with the requirements of law.

5. The policy underlying removal has been held to be mainly to avoid the sad spectacle of some poor benighted defendant unacquainted with the law and procedure in a state court, here N.Y., having to come here as a confused yokel to defend himself in what to him is a foreign and therefore hostile sovereignty. Such a policy is not called into play here.

a) Defendant in this case stated to plaintiff in 1981 and on other occasions that he had many cases in New York State, and many others throughout the United States. Plaintiff and the undersigned believed such statements to be true. Therefor this defendant comes to New York, not as a barefoot yokel deceived and confused, but as he claimed an experienced counsel familiar with the law and procedures in New York. Defendant told plaintiff that he had, in addition to his cases in New York and elsewhere in the United States, about 1000 cases in the United Kingdom

alone. Thus it appears, according to defendant, that he is not dis dvantaged in any jurisdiction, but a lawyer who has eagerly sought business in various jurisdictions other than Vermont, and represented to his clients that he was comfortable in dealing with foreign sovereigns, alien to Vermont.

b) Equally important, we can conclude with confidence that, since this is a malpractice case, the attorneys for the defendant represent a malpractice insurance carrier, which no doubt has an office in the State of New York and elsewhere in the several states. That carrier is no stronger to the New York courts, and is no doubt very much at home here and in many other states.

c) Most important, the diversity of citizenship in this case is more apparent than real. As the affidavit of the plaintiff shows, the defendant actively solicited cases in the State of New York by a person who was employed here by the New York Post. He solicited plaintiff's case here. It is not possible to state whether that person was paid by the defendant for her efforts to steer New York cases to defendant. Paid or unpaid, that person was defendant's agent for the purpose of acquiring cases for him at his lair in Vermont.

The cream of the jest is that defendant was not then, in 1981, admitted to practice in the U.S. District Court of the Southern District of New York, and was, and is not now, admitted to practice there. Annexed hereto as Exhibit 2 is a letter, responding to my inquiry, stating that there is no record of any admission date for defendant in the Southern District of New York. Equally important, examination of Martindale Hubbell, defendant's Exhibit B to the notice of removal, discloses that he does not claim to be admitted to practice in the Southern District of New York. The page of said Law Directory dealing with defendant follows as Exhibit B of the notice of removal and shows that he does not even claim to be admitted in the Southern District of New York, even now.

Strangely defendant commenced action on behalf of plaintiff originally in Maryland, transferred it to Kansas, and thereafter to District Court New York. From Martindale Hubbell and defendant's Exhibit B, it appears that he was not admitted to a district court in Kansas, nor to a district court in Maryland. See Exhibit 3 hereof and the defendant's letter of

11/14/84 and Exhibit 4, defendant's letter of October 16, 1984. Once it became clear that this is not one of the cases where he could achieve a settlement for plaintiff, defendant abandoned his efforts on behalf of plaintiff, and eventually abandoned the case and made a motion to withdraw entirely.

Exhibits 3 and 4 are letters from defendant dated 1984 to plaintiff disclosing that this case formerly pended in Maryland and Kansas in that order. From Martindale Hubbell (Exhibit B of the notice of removal) it is clear that the defendant was not admitted in any of the U.S. District Courts where the case has pended. Therefor he was not qualified to try the case in any State court. He simply was unable to try this case at any time before he withdrew from the case in 1995.

Equally important, it was professional misconduct for him to commence an action in a court to which he was not admitted to practice and for him to transfer the case to a court in which he was not admitted to practice. It is misconduct not only to try a case in a court to which an attorney is not admitted, but also is misconduct for such a lawyer to even commence an action in such a court, to effect a transfer thereto.

There came a juncture in 1993 when two of the attorneys for the defendants, Dalkon Shield Claimants Trust, made a motion in the U.S. District Court, Southern District of New York and were admitted pro hoc vice. Those were Paul Strain, Esq. and Elizabeth Honeywell, Esq. Annexed hereto and marked Exhibit 5 hereof is the order of the District Court granting their application to be so admitted in the Southern District. Service of the said order was made upon the current defendant on December 21, 1993 as is seen from the certificate of service which is part of the exhibit. On December 21, 1993 this defendant was thus told very plainly that if he intended to try this, he needed to get off his rocking chair, and apply to be admitted in the Southern District of New York either as a permanent member of its bar or pro hoc vice. He never was admitted. He was not an attorney at law in the New York, or Kansas, or Maryland District Courts.

The inference is clear and compelling that defendant solicited and obtained a retainer from the plaintiff whose stated purpose was for defendant to conduct a case on behalf of plaintiff, and to conduct a trial of

the case, unless a suitable settlement was secured before trial. It is plainly evident that he never intended to try plaintiff's case, and legally was not in a position to do so, and was not qualified to try a case in any of the 3 districts of Federal Court in which plaintiff's case has appeared. 13 years passed before defendant abandoned this case. Defendant's conduct constituted a common law fraud, albeit a promissory fraud.

It is therefor submitted that defendant, as part of the fraud, created a merely colorable diversity of citizenship, and therefor is estopped to rely on diversity of citizenship in his removal proceedings and the case should be remanded to Supreme Court, Westchester County.

6. The notice of removal served upon the Supreme Court, Westchester County was directed simply to the "Clerk of the Court". It is therefor defective. The Constitution of the State of New York provides:

"c. The clerks of the several counties shall be the clerks of the Supreme Court..."

Therefor, to be valid the notice of removal should have been addressed to the "Clerk of the County of Westchester" and served upon him.

7. Rule 5 of the Rules of the Southern and Eastern Districts of New York in a special portion provides as follows:

Rule 25. Removal of Cases from State Courts

(a) [repealed].

(b) If the court's jurisdiction is based upon diversity of citizenship (28 U.S.C. § 1332) the petition for removal shall set forth the states of citizenship and residence, address of each party named in the caption and, in the case of a corporation, the state of incorporation and of its principal place of business, regardless of whether service of process has been effected on all parties. If such information or a designated part is unknown to defendant, defendant may so state, and in that case plaintiff within twenty (20) days after removal shall file in the office of the clerk a statement of the omitted information.

(c) Within twenty (20) days after filing the petition and bond, the petitioner shall file with the clerk a copy of all records and proceedings in the state court.

(d) Upon entry of an order, remanding the case to the state court, the plaintiff shall deposit with the clerk a copy to be certified and mailed by the clerk to the clerk of the state court. (Emphasis added)

On the face of the "Notice of Filing, Notice of Removal" from the Supreme Court, County of Westchester there appears the following: "A true and correct copy of Notice of Removal with the Clerk of the Supreme Court of N.Y., County of Westchester effects a removal, etc." This statement negates any possibility that a certified copy of the notice of removal was ever served or furnished to anyone, let alone to the proper clerk, to wit, Clerk of Westchester County.

Subdivision 3 of the rules requires the filing of a "bond" as part of the "petition for removal" by a "notice of removal". But the Rule has not been changed. Thus in the Southern District it is still mandatory that a bond be given as a part of proceedings to remove. Here there is no bond and the proceedings are fatally defective.

WHEREFORE plaintiff respectfully asks that an order be entered in this action remanding this case to the Supreme Court, Westchester County plus the costs and disbursements of this motion and granting such other and further relief as the Court deems proper in the premises.

Dated: Yonkers, New York
October 2, 1995

[signed] Richard W. Fulfree
RICHARD W. FULFREE (1268)
Attorney for Plaintiff
612 E. Grassy Sprain Road
Yonkers, New York 10710
(914) 961-7500

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
ELLEN P. FULFREE,

AFFIDAVIT

Plaintiff,

Index No. 95-13051
-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Judge Assigned: HON. DENNY CHIN

Defendants.
----------x

State of New York :
: ss
County of Westchester :

ELLEN P. FULFREE, being duly sworn deposes and says:

I am the plaintiff in the above entitled case and make this affidavit in support of plaintiff's motion to remand this action to the Supreme Court, Westchester County.

The complaint in this action is before the Court as an exhibit filed with the notice of removal. I hereby swear to all the material contained in the complaint in the precise manner in which I swore to the verified complaint in my verification thereof. Attached to the complaint is a letter from defendant to plaintiff dated June 15, 1981 and an acceptance of defendant's proposed agreement of retainer dated June 24, 1981 bearing my signature. The genesis and history of said document is as follows: Some time before June 24 I read an article in the New York Post concerning Dalkon Shield lawsuits and was reminded of my own operation and surgically imposed menopause. I called that newspaper and

spoke to a person to whom I was referred. The woman on the phone recommended defendant. I called the defendant from my home on the phone and we discussed the terms on which he would accept my case. Thereafter I received a proposed retainer agreement and a piece at the bottom for my signature which I was supposed to sign in the event I accepted his offer to represent me. I signed the acceptance thereof and mailed the same to the defendant in Vermont. The retainer and its acceptance are Exhibit A of my complaint which is attached to the notice of removal. This retainer was accomplished without my leaving my home on Bennett Avenue, Yonkers. At no time during the pendency of this case have I ever entered the State of Vermont to confer with defendant or for any other purpose connected with this case. This agreement is an exhibit of the complaint and therefore is attached to the notice of removal.

At our first discussion, and on a number of occasions thereafter, defendant told me he had other Dalkon Shield cases pending within New York State, other cases in the several states, and thousands in the United Kingdom alone. He also assured me he was an expert in products liability cases, and that he personally would try my case when it came to trial. These representations were made on many occasions and constituted the basic foundation of our attorney-client relationship. It is important that on page 2 of the retainer agreement, which is part of the notice of removal since it is an exhibit of the complaint in this action, occurs the following: "I will retain total control of your case and will be head counsel at the time of your trial". In the same retainer agreement there appears the following: I will keep you periodically informed of all such expenses but do not believe they will be large, unless I am required to actually try your case. (Emphasis added) I have never heard that any local counsel (N.Y. counsel) ever worked on my case and I agreed to retain him only because of my belief of the false misrepresentations.

If he had not represented to me that he is a products liability expert, and that he would be lead counsel at trial and if I had known that he never intended to bring this case to trial and intended only to seek a settlement, I would never have retained him and would never have anything to do with him. I relied upon his representations and have been damaged thereby. The delay of more than 13-1/2 years before he abandoned the case would be a breach of any retainer agreement or even of a relationship between lawyer and client in which the lawyer makes no

representations of any kind. As is seen in my complaint, such a delay is itself a misdemeanor on the part of the attorney.

Annexed hereto and made a part hereof is Exhibit 6, a memorandum I prepared for my own use on December 14, 1994. It is all true and on December 14, 1994 I had a vivid memory of all of the facts in the said memorandum. My memory of the facts therein is still very clear. The exhibit is based in large part on documents in my possession, both on December 1, 1994 and at the present time. At the appropriate occasion and the proper time, I will produce all of the records. The important thing is that I now have a clear memory of all of the facts set forth in that exhibit and I hereby swear to each and every fact therein set forth.

In the exhibit there is mentioned a stipulation which defendant prepared and which I refused to sign. That exhibit is attached hereto and marked Exhibit 7. It is a stipulation made after the Schachter Test and before I had two tests at Smith, Kline, and Beecham. The first test of Smith, Kline and Beecham was negative and the second indicated that my ancient problem was chlamydia pneumonia. The Schachter test report was vague and unsatisfactory and in the event turned out to be inaccurate, false and crude. But assuming for the moment that it was accurate and impeccable, what interest could my counsel have in pressing me to sign a stipulation accepting a harmful document, either flawed or impeccable? It is not his job to prepare and urge me to sign a document which is damaging to me. He himself told me that signing the stipulation based on the Schachter Test report would be tantamount to a stipulation of discontinuance. I do not believe that it is so and nor does my counsel, but it would be damaging to some degree. If it were damaging in any degree it did not lie in the mouth of my lawyer to urge me to do myself damage in any degree. It was gross misconduct on his part to urge strongly that I damage my own case.

The second stipulation was never prepared. He urged me to sign a stipulation of discontinuance, which I firmly refused to do. It is transparently clear that defendant never intended to try my case. He was frightened of the Robins Co., Inc., of the Dalkon Shield Claimants Trust, or of trial work generally, or possibly he was frightened of all three.

Annexed hereto and marked Exhibit 8 hereof is a letter by

defendant stating that my case had been filed in both Maryland and New York and was pending simultaneously in both districts. (1) What has happened to the defense of "prior action pending?" (2) He was admitted to practice neither in Maryland or New York.

The only possible conclusion is that he was afraid to try my case, and that he put his own interest above mine, to wit, his cowardice, over my welfare. Very important is a letter I received from him dated 6/21/82 concluding "we ... can expect to make an overwhelming case against Robins." That letter is Exhibit 8 hereof.

This it is clear that 1. defendant was not admitted in any of the Federal Courts in which this case has made its appearance, to wit, Kansas, Maryland and New York, 2. He was not eligible to commence a lawsuit in any of those jurisdictions as attorney for a party, 3. He was not an attorney-at-law in any of those jurisdictions, 4. He was mortally frightened of trying this case and sought with might and main to destroy this plaintiff to serve his own interests. His fear and timidity furnish the only conceivable explanation for defendant's holding this case for 13-1/2 years and then abandoning it.

I have studied the statement of Richard W. Fulfree on this motion and find it to be true and accurate in all respects.

WHEREFORE plaintiff respectfully asks for an order remanding. this case to the Supreme Court, Westchester County and granting all other relief prayed in the notice of motion and in the statement of Richard W. Fulfree, Esq. submitted herewith.

[signed] Ellen P. Fulfree
ELLEN P. FULFREE

Sworn to before me this
29th day of September, 1995

[signed] Morton N. Wekstein
NOTARY PUBLIC

[stamped]

MORTON N. WEKSTEIN
NOTARY PUBLIC. State of New York
No. 60-9600500
Qualified in Westchester County
Term Expires August 30, 1996

KOPFF, NARDELLI & DOPF

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

ELLEN P. FULFREE,

NOTICE OF FILING
NOTICE OF REMOVAL

Plaintiff,

Index No. 95-13051

-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants.

----------x

TO: CLERK OF THE COURT:

YOU WILL PLEASE TAKE NOTICE, that defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES have filed in the United States District Court for the Southern District of New York, 40 Foley Square, New York, New York 10007 a Notice of Removal of this Supreme Court action to the District Court of the United States, Southern District of New York, 40 Foley Square, New York, New York 10007.

A true and correct copy of the Notice of Removal is attached to this notice. The filing of this notice and copy of Notice of Removal with the Clerk of the Supreme Court of the State of New York, County of Westchester, effects a removal to the District Court of the United States, and the Supreme Court of the State of New York, County of Westchester may proceed no further, unless this case is remanded. 28

U.S.C. 1446(d).

Dated: September 11, 1995
New York, New York

Respectfully submitted,
KOPFF, NARDELLI & DOPF
By: [signed] Martin B. Adams
MARTIN B. ADAMS
Associated with the Firm
Attorneys for Defendants
440 Ninth Avenue
New York, New York 10001
(212) 244-2999

TO: RICHARD W. FULFREE, ESQ.
Attorney for Plaintiff
612 East Grassy Sprain Road
Yonkers, N.Y. 10710

[stamped] JUDGE CHIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ELLEN P. FULFREE,

NOTICE OF REMOVAL

Plaintiff,

-against-

Docket No.

[stamped] Received, 9/7/95, U.S.D.C. S.D. N.Y.

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants.

----------x

Defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES hereby file this Notice of Removal of the above-described action to the United States District Court for the Southern District of New York, 40 Foley Square, New York, New York 10007 from the Supreme Court of the State of New York, County of Westchester, where the action is now pending, as provided by, Title 28, U.S.C. Chapter 89, and state:

1. This cause was commenced in the Supreme Court of the State of New York, County of Westchester by filing of a Summons and Complaint on or about August 15, 1995, and process was served upon removing defendants on August 23, 1995. A copy of plaintiff's complaint is annexed hereto as Exhibit "A".

2. The action is a civil action for compensatory damages based

upon alleged lawyer malpractice.

3. The ground for removal is that diversity jurisdiction exists, as there is complete diversity of citizenship and the amount in controversy exceeds the sum or value of $50,000.

4. Plaintiff contends this matter in dispute exceeds the sum of fifty thousand dollars ($50,000) exclusive of interest and costs.

5. At the time of commencement of this action, plaintiff resided at 115 Bennett Avenue, Yonkers, New York. Defendant MANCHESTER LAW OFFICES is deemed to have a residence at One Lawson Lane, Burlington, Vermont 05401. Defendant ROBERT MANCHESTER resides at 5 Pond Road, Shelburne, Vermont 05482.

6. A copy of all pleadings, process, and orders served upon defendants is filed with this notice.

7. Defendants will give written notice of the filing of this notice as required by 28 U.S.C. Section 1446(d).

8. A copy of this notice will be filed with the Clerk of the Supreme Court of the State of New York, County of Westchester, as required by 28 U.S.C. Section 1446(d).

9. This notice of removal is being filed within thirty days after the receipt by defendants of a copy of the initial pleading setting forth the claim for relief upon which the action is based. 28 U.S.C. Section 1446(b).

WHEREFORE, defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES respectfully request that this action proceed in this Court as an action properly removed to it.

Dated: September 6, 1995
New York, New York

Respectfully submitted,

KOPFF, NARDELLI & DOPF

By: [signed] Martin B. Adams
MARTIN B. ADAMS
Associated with the Firm
Attorneys for Defendants
440 Ninth Avenue
New York, New York 10001
(212) 244-2999

TO: RICHARD W. FULFREE, ESQ
Attorney for Plaintiff
612 East Grassy Sprain Road
Yonkers, N.Y. 10710

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK
500 PEARL ST.
NEW YORK, N.Y. 10007

[hand written]

September 20, 1995

Dear Mr. Fulfree,

In response to your request on - Robert Manchester - Esq., I have no admission date for him. For further information please contact the Grievance Committee via - District Executive Office @ (212) 637-0500

Sincerely,

Keith C. McLean

[labeled] EXHIBIT 2

MANCHESTER & O'NEILL
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
P.O. BOX 1459
BURLINGTON, VERMONT 05402-1459
802-658-7444

November 14, 1984

Ms. Ellen P. Surlak
115 Bennett Avenue
Yonkers, NY 10701

Dear Pat:

I have requested and obtained a transfer of your case from Federal Court in Kansas to New York. The transfer should be effected within the next 30 days and will thereafter appear on the appropriate court calendar for the Southern District of New York.

Since I expect you case will be scheduled for a status conference in the near future, it is very important to determine how soon your divorce will be granted.

Please keep me closely informed of the progress you make toward resolving the divorce. I will keep you closely informed as to scheduling of your case.

Sincerely yours,
MANCHESTER & O'NEILL, P.C.
By: [signed] Bob
ROBERT E. MANCHESTER

REM/dj
d.317

MANCHESTER & O'NEILL
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
P.O. BOX 1459
BURLINGTON, VERMONT 05402-1459
802-658-7444

October 16, 1984

Ms. Ellen P. Surlak
115 Bennett Avenue
Yonkers, NY 10701

Dear Pat:

Please keep me closely advised as to the efforts you and Richard are taking to resolve your divorce case. After our recent conversation, I did file the stipulation with Judge Black and your case is now dismissed in Maryland.

There has been a great deal of activity in the Dalkon Shield litigation and I believe it will be appropriate for us to seek a return of your case from the Kansas MDL once we can develop some idea of timing for the divorce.

Sincerely yours,
MANCHESTER & O'NEILL, P.C.
By: [signed] Bob
ROBERT E. MANCHESTER

REM/dj
d.282

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT NEW YORK
----------x

ELLEN FULFREE

Plaintiff,

Civil Action No.:
81-CIV-5116
(Keenan, J.)

-against-

DALKON SHIELD CLAIMANTS TRUST

Defendant.

----------x

IT IS HEREBY ORDERED that the motion for the pro hac vice admission of Elizabeth Honeywell and Paul Strain as counsel for the Dalkon Shield Claimants Trust be granted.

Date: _____, 1993

_____ [unsigned]
Hon. John F. Keenan
District Judge

[labeled] EXHIBIT 5

[labeled] EXHIBIT 6

Ellen P. Fulfree
115 Bennett Avenue
Yonkers, New York 10701
(914)476-1811

December 14, 1994

Re: Ellen Fulfree v. Dalkon Shield Claimants Trust
Index # 81 CV 5116

Summary of my personal notes.

Mr. Manchester advised me in August of 1993 that the Claimant's Trust was pursuing as a defense of these cases that the claimant had Chlamydia and that this was the cause of the PID which led to the injuries, and not the presence of the Dalkon Shield. In order for me to have a stronger case against the Claimant's Trust I should have a blood test done that would show if I had been infected with Chlamydia 20 years ago. He told me that if I did not submit to this test voluntarily the Court would order me to do so under Rule 35. I felt that I had little choice in the matter, so I followed his instructions and had my Physician write out the prescription for a chlamydia antibody test and had my blood drawn on August 31, 1993.

I would find out a number of weeks later (September 16th or 17th) that the tests that were ordered by my physician were not done. Instead a different test was done on my blood sample that was never explained to me.

Within two weeks Karen Whalen called me from Mr. Manchester's office and said that the test showed I had a negative result for a current infection and a positive titer of 32. She did not know what the 32 meant exactly, but it could mean a past exposure or infection at some undetermined time. She went on to say that Mr. Manchester would come down to meet with me on September 22 for the purpose of discussing strategies with me.

At this meeting he informed me that I could not go forward with my case because of the test result. He could not explain what the test was, neither its name or what the results meant. He told me that Dr. Schachter would not testify in my case because he could not help me. He informed me that the Judge would "throw out my case" and if I went forward I would spend $50,000 to $60,0000 for expert witnesses and I would suffer all sorts of personal embarrassments if I continued to pursue my case. I asked him to explain the result of the finding of 32 on the lab slip and further why he had suddenly developed this negative attitude to my case which he so enthusiastically pursued for the past 14 years. I told him that I was not convinced that my case was flawed and I wanted to do some research concerning the tests. Subsequently in phone conversations I asked Mr. Manchester to have me submit to another test. I urged this and as I was convinced this test was a [sic] the least inconclusive. At the meeting on September 22, 1993, Mr. Manchester had in his possession a stipulation which was prepared by the Claimant's Trust and which he urged me to sign. He explained to me that signing this stipulation would terminate my case.

I told him I would not sign anything I did not fully understand. During the next few weeks, via letters and telephone conversations, he discouraged my submitting to another blood test, but instead he arranged for a Dr. Cohen, a gynecologist, to speak to me by way of a conference call. Contrary to Mr. Manchester advice I had an identical (the same test request that Dr. Burke wrote on the prescription sent with the first sample) Chlamydia test performed by Smith Kline Laboratories and the results of these test were unequivocally negative for both present and past Chlamydia infections and instead of a lab slip we received a full report.

When I had the conference call with Dr. Cohen I was already armed with the negative report and also hours of research I had undertaken to understand the test and the disease of Chlamydia itself. The conversation with Dr. Cohen did little to interpret the earlier test or answer any questions concerning how the earlier test destroyed my case against the Claimant's Trust.

Dr. Cohen, not knowing, that we had negative results from the second test, agreed that a second blood test should be undertaken and

ironically suggested Smith-Kline Laboratories. Mr. Manchester continued the pressure using the conference and deadline for discovery as reasons for the case to be terminated immediately and further the economic duress hereinabove stated.

On November 3, 1993 I advised Mr. Manchester of the negative test result and sent him a copy of the Smith-Kline report. Again I might point out that the test performed earlier and the SmithKline test were done on identical prescriptions written by the same doctor. On November 5th, Mr. Manchester advised me that the SmithKline test were not good enough. He said, "according to the Trust the test I had done was not the one done in California". What the Trust wanted was a test described as "Chlamydia Species Differentiation Antibody Panel Micro IFA". I again asked SmithKline to do this test, but was informed that I would need a new prescription from my Physician. This was obtained and sent to Smith-Kline and they preformed the test on the sample of blood that I had previously sent them. The results of this test were a borderline positive for past infection at an undetermined time for chlamydia trachomatis and a higher titer for chlamydia pneumonia (this indicated a stronger reaction to the pneumonia organism).

My gynecologist-surgeon who performed my surgery had already advised Mr.Manchester and the Trust in an earlier deposition that the causation of my PID was e.Coli resulting from the use of the Dalkon Shield. For some reason both Mr. Manchester and the Trust attorneys did not seem to want to credit his testimony.

In August when Mr. Manchester first discussed the test with me he told me the Trust would have no case if the test came up negative. I asked him what would happen if it came up positive. He said that the test often showed a "false negative or a false positive results, or if it showed minimal amounts of antigens that that could indicate infection via airborne organisms, such as Parrot Fever". In addition, he said "even if it where accurate the test can not state when the disease was contacted", ie, whether it was a recent infection or an infection contracted 25 years earlier. The Trust attorneys claimed that the test was a "simple blood test" in a letter to Judge Keenan. This is a total obfuscation of the true fact, because only a few laboratories in the county do this test.

In reading over various letters written by the Trust and Manchester the following communications occurred:

Strain asked Manchester about getting a titer test "starting in June of 1993"

Manchester says talk occurred in July of 93.

Lab slip from the California lab says the test was reported on September 3rd.

Strain says in a letter to Judge Keenan (Nov. 20, 1993) that "Mr. Manchester reported orally to me on September 13 that the antibody titer showed evidence of a previous chlamydia infection and that he would meet with his clients to discuss the impact of the results on their case".

Elizabeth Honeywell in a letter to Judge Keenan (Nov. 16th) said that "After informing the Trust of the result, Mr. Manchester requested time to meet with his clients and explain to them the impact of the results on their case".

The first time I heard the results of the test were around the 16th of September from Karen Whalen, the paralegal in Manchester's office. The first time Manchester discussed the test with me personally was on the 22 of September.

From September on Manchester denied ever telling the Trust the results of the test. When on December 6th in Judge Keenan's Court, a lawyer form [sic] the Trust said "Plaintive had Chlamydia tests done and it was positive", I asked him how they knew and he replied "they must have surmised it".

From the 22nd of September when I refused to sign the stipulation that the Trust had prepared for me to sign, stipulating that I had chlamydia, Manchester has tried to intimidate me into giving up the case. (Almost all phone conversations held after Sept. 22 were conference calls with others in his office present)

The following statements are examples of the pressure that Manchester would bring to bear in order to make me to drop my case.

This started from September 22 of 1993 and has continued up to the present.

The costs would run as high as $100,000.
We have no chance to win
The Judge could throw out the case.
The Judge will allow the chlamydia defense.
There is just no way around the Chlamydia issue.

You should concede the Chlamydia issue because it will be less confusing to a Jury.

In his December 5, 1994 letter to me he wrote "In addition, based upon one of our meetings with Judge Keenan, we have learned of his strong views pertaining to the chlamydia defense which he allowed in a Copper 7 case which produced a defense verdict about two years ago".

The cross examination will be very embarrassing to me.

We cannot use Dr. Beals as a witness because "his testimony is impeachable", and his friendship with Richard will be against us.

My record with the WJCS (counselling sessions when my first marriage was dissolving in 1972-73) - "they would use them to make me look bad". Prior to September 1993 he felt there was nothing harmful to me in these most personal records.

Questioning my fidelity to Richard and his fidelity to me. He said, "sit down with Richard and a bottle of wine and bear your lives to each other". He did not want any surprises.

He said on Oct. 3, 1994 that he, believes that it is "not unreasonable to think that the trust would have private investigators looking into our lives". A few minutes after this conference call Tina Mulvey called me back to ask me if I ever indulged in anal intercourse

or had any abscesses in my teeth.

I have asked Manchester to send me an itemized account of costs on many occasions and to date have only received one summary totaling $31,504.16 and dated September 16, 1994.

Richard and I also discovered that the Courts file of my case had been lost. This was in September of 1993. It had to be recreated from the Lawyers files.

[labeled] EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
----------x

ELLEN P. FULFREE,

Plaintiff,

Civil Action No. 81-CV-5116

v.

DALKON SHIELD CLAIMANTS TRUST

Defendant

----------x

STIPULATION OF PARTIES REGARDING CHLAMYDIA TITER

1. Pursuant to request of defendant Dalkon Shield Claimants Trust and agreement of plaintiff Ellen Fulfree, a blood sample for chlamydia Trachomatis antibodies was obtained from the plaintiff on or about September ___, 1993.

2. The sample was tested for the presence of chlamydia trachomatis antibodies at the Chlamydia Laboratory of San Francisco General Hospital on or about September ___, 1993 under the direction of Julius Schachter, Ph.D.

3. The results of the sample were as follows:

Chlamydia Trachomatis IgM antibody titer 1:___
Chlamydia Trachomatis IgG antibody titer 1:___

4. A true copy of the results, as provided to plaintiff's counsel Robert Manchester by the testing laboratory, is attached as Exhibit A.

5. Defendant Dalkon Shield Claimants Trust and Plaintiff, Ellen Fulfree, by their respective undersigned counsel, stipulate and agree to the truth of the foregoing statements.

_____[unsigned]
Paul F. Strain
VENABLE, BAETJER AND HOWARD
1800 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Baltimore, MD 21201
(410) 244-7400

Attorney for Defendant,
Dalkon Shield Claimants Trust

_____[unsigned]
Robert Manchester
Manchester Law Offices
P.O. Box 1459
Burlington, VT 05402-1459
(802) 658-7444

Attorney for Plaintiff,
Ellen Fulfree

[labeled] EXHIBIT 8

LISMAN & LISMAN
ATTORNEYS AT LAW
P.O. BOX 728
BURLINGTON. VERMONT 05402
802-864-5756

June 21, 1982

Ellen P. Surlak
115 Bennett Avenue
Yonkers, NY 10701

Dear Pat:

I have great news to share with you. On Friday, June 18, 1982, the Appeals Court in California reversed the class action which Judge Williams had ordered. This is excellent news for us. I have not yet read the decision and I will advise you again as soon as I have received the decision. Nevertheless, the newspaper article of June 19, 1982, published in the Burlington Free Press, a copy of which is enclosed, states my views.

I will be in touch with you as soon as I have had an opportunity to review the decision.

Also, there have been some other important developments in your case relating to our evidence. For your assistance, we enclose a copy of our supplementation to Answers to Interrogatories in the recall case. The data contained in this document means that we basically have reached the end of the road for all our research and can expect to make an overwhelming case against Robins.

Sincerely yours,

[signed] Bob
Robert E. Manchester

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ELLEN P. FULFREE,

Plaintiff,

AFFIRMATION IN
OPPOSITION

Docket No. 95 Civ. 7723 (DC)

-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants.

----------x

MARTIN B. ADAMS, affirms the following to be true under the penalties of perjury:

1. I am an attorney and am a member of the bar of this Court. I am associated with the law firm of Kopff, Nardelli & Dopf, attorneys for defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES in the abovereferenced action.

2. This Affirmation is submitted in opposition to plaintiff's Motion to remand to the state court.

3. This Affirmation is made upon information and belief, based upon the file maintained by your affirmant's office in connection with the above-captioned matter. I have reviewed that file and, on that basis, I am fully familiar with the proceedings heretofore had herein.

(a) Defendants are citizens only of Vermont

4. Defendant Robert Manchester confirms in an Affidavit

annexed hereto as Exhibit "A" that he is a citizen, registered taxpayer, resident, and voter in Vermont, and is not a resident, voter, or citizen of New York. Mr. Manchester also confirms that Manchester Law Offices, P.C. is a professional corporation licensed under the laws of Vermont, and has only one business location (Burlington, Vermont).

5. The "nerve center" of defendants is clearly in Vermont. The day-to-day control of defendants' files, including Dalkon Shield case files, takes place in Vermont. The day-to-day administrative work takes place in Vermont. Income taxes are filed only in Vermont. Defendants do not advertise in New York, and there has been no active solicitation of any cases through the New York Post or its employees (Exhibit "A").

6. Diversity jurisdiction exists in this case, and removal to federal court was properly based upon diversity jurisdiction.

7. Plaintiff's counsel claims diversity is "more apparent than real" [Affirmation of Richard W. Fulfree, Esq., p. 5], and counsel devotes considerable verbage to attacking defendants (Id. at pp. 5-8). Defendants vigorously deny the charges, and Mr. Manchester identifies in his Affidavit the jurisdictions in which he is licensed.

8. More importantly to this motion practice, the allegations raised by plaintiff are irrelevant. Diversity is dependent upon citizenship of the parties, not upon the alleged merits of the claims of negligence. Defendants have proven that diversity jurisdiction exists. Plaintiff's motion to remand should be denied.

(b) Defense counsel's signature

9. Your affirmant is the attorney of record. Your affirmant's signature appears in my individual name, as required by section (a) of Rule 11. That Rule does not require that owners of the lawfirm sign the document; it requires only that the document be signed "by at least one attorney of record in the attorney's individual name..."

10. In the spirit of cooperation, your affirmant has deleted the sentence, "Associated with the Firm" from the signature block. Your

affirmant verily believes that the deletion will cure the objection raised by plaintiff's counsel.

11. Plaintiff's counsel criticizes your affirmant's signature, even though the name is typed underneath. Your affirmant will sign his name in a neater fashion in the future.

(c) The situs of removal

12. The Notice of Removal was filed in the proper District. Removal was effectuated to the Southern District, which has courts held at New York and White Plains. The 1995 Edition to the Federal Civil Judicial Procedure and Rules (West Publishing Co.) does not indicate that the Southern District is divided into divisions [Id. at p. 514], unlike for example Minnesota (which "constitutes one judicial district comprising six divisions"; Id. at p. 511).

13. The Civil Cover Sheet merely asks which location to which the case should be assigned (Exhibit "B"). Defendants selected Foley Square, as the underlying personal injury action on which this legal malpractice action is based is venued in the Southern District, Foley Square.

14. Plaintiff's counsel has notified this Court that he is "designating... the White Plains Southern District Courthouse as the forum to handle this matter." (Exhibit C"). Defendants have not opposed that designation. Accordingly, plaintiff's objection raised in her Motion with respect to divisions is moot.

(d) Service of the Notice of Removal

15. Plaintiff is incorrect to claim that the Notice of Removal is defective. Section 1446(d) provides that a copy of the Notice shall be filed with the clerk of the State court. That was done here: The caption of the Notice of Filing Notice of Removal clearly indicates that the Notice is being filed in the "Supreme Court of the State of New York, County of Westchester", and is directed to the Clerk of the Court (Exhibit "D").

16. A copy of the Notice of Removal was filed with precisely the individual who the statute says must receive a copy: The Clerk of the Supreme Court of the County of Westchester.

17. Plaintiff's counsel claims that Local Rule 25 requires a certified copy of a notice of removal be served upon the Clerk of the Supreme Court, Westchester County. Yet, counsel cites from subdivision (d) of that Rule, which requires that a certified copy of "an order, remanding the case to the state court" be deposited with the clerk. There has been no order of remand issued in this case. Counsel for plaintiff seems to have erroneously misread that section to require a certified copy of the Notice of Removal be deposited.

18. Concerning the alleged need for a bond, it is unclear to what rule plaintiff's counsel is referring. Counsel refers to "subdivision 3 of the rules", without any further specification. In any event, the 1988 amendments to 28 U.S.C. 1446 eliminated the requirement that a surety bond be filed as security.

(e) Remand is neither warranted nor justified

19. Defendants respectfully submit that there is no basis or justification for remand to state court. Plaintiff's motion should be denied.

20. Remand is allowable if there is lack of subject matter jurisdiction or there is a defect in the removal procedure. Here, there is complete diversity of citizenship. Plaintiff is a citizen of New York, and both defendants are citizens of Vermont. As indicated in the attached Affidavit of Mr. Manchester, Manchester Law Offices is incorporated in Vermont and has a principal place of business in Vermont.

21. There are no defects in the Notice of Removal. Remand for procedural defects rests in the sound discretion of the federal court. There is no basis to remand for any defects, as there are no defects - every step taken by defendants to remove has been in strict accordance with the federal statutes and rules. Defendants have demonstrated herein that there is no merit to plaintiffs motion.

22. Defendants have proven the existence of diversity. Defendants have proven that all procedural requirements for removal have been complied with.

(f) Leave to amend tile Notice of Removal is respectfully requested

23. In the event this Court finds that the allegations of defects raised by plaintiff constitute defects, then leave to amend is respectfully requested. The amendment would be to designate White Plains as the courthouse (as plaintiff has already designated, without objection from defendants), and to state explicitly that defendants are citizens of Vermont, and Manchester Law Offices is incorporated in, and has a principal office in Vermont.

24. There would be no prejudice to plaintiff from such amendment. The Notice of Removal explicitly states that removal is based upon diversity, and defendants reside in Vermont while plaintiff resides in New York. Plaintiff has been aware at all times that defendants are citizens of Vermont, as plaintiff and plaintiff's counsel's oral and written communications have been to defendants in Vermont.

25. Defects in a notice of removal are curable by amendment in federal court. The alleged defects raised by plaintiff (which defects defendants deny) are not jurisdictional; removal should be upheld and amendment should be allowed. Attached as Exhibit "E" is a copy of the proposed amended Notice of Removal.

26. Defendants respectfully refer this Court to the annexed Memorandum of Law. That Memorandum cites case law to support defendants' positions that removal was properly effectuated and that remand is not warranted.

27. For all of the reasons stated herein, defendants respectfully request that plaintiff's Motion for an order remanding this case to the Supreme Court, Westchester County be denied.

WHEREFORE, it is respectfully requested that plaintiff's Motion be denied in its entirety, together with such other and further

relief as to this Court seems just and proper.

Dated: October 18,1995
New York, New York

Respectfully submitted,
KOPFF, NARDELLI & DOPF

By: [signed] Martin B. Adams
MARTIN B. ADAMS-0825
Attorney for Defendants
440 Ninth Avenue
New York, New York 10001
(212) 244-2999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ELLEN P. FULFREE,

Plaintiff,

MEMORANDUM OF LAW
Docket No. 95 Civ. 7723 (DC)

-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants.
----------x

Defendants respectfully submit that there is no basis for remanding of this case to state court. Plaintiff's motion to remand should be denied.

(a) Defendants have fully complied with removal procedures

Defendants fully complied with the procedures to effectuate removal. Your affirmant is an "attorney of record" who signed the Notice "in the attorney's individual name", as required by Rule 11.

A copy of the notice served upon plaintiff was filed with the state court clerk to effect the removal. 28 U.S.C. 1446(d). A removal bond is not required under current law. 28 U.S.C. 1446, as amended by 1988 amendments.

(b) Jurisdiction exists based upon diversity of citizenship

This Court has subject-matter jurisdiction over the parties and the controversy based upon diversity of citizenship between the plaintiff and all defendants. There are no local defendants.

Any case that could have been commenced in federal court based on diversity of citizenship can be removed from state court on that ground. 28 U.S.C. 1441(b). As indicated in the Affidavit of Mr. Manchester, annexed hereto as Exhibit "A", both defendants are citizens of Vermont. Manchester Law Offices is a citizen only of Vermont, as it is incorporated in Vermont and has its principal place of business in Vermont. 28 U.S.C. 1332(c).

Plaintiff's counsel observes that defendant has cases in states other than Vermont. Yet, defendants' only office is in Vermont. The day-to-day control of the cases takes place at the Vermont office, the files are kept in Vermont, and all administrative functions take place in Vermont, since that is where the sole office is located (Exhibit "A").

In addition, defendants do not advertise in New York. Defendants file income tax returns only in Vermont (Exhibit "A"). Defendants are obviously most notably present in Vermont, as the "nerve center" for defendants is their [sole] office, which is in Vermont. J.A. Olson Co. v. City of Winona, 818 F.2d 401 (5th Cir. 1987).

Plaintiff's arguments about defendants not being strangers to New York and not needing the protection of federal courts from local state courts are irrelevant. Plaintiff's arguments pertain to situations where there are local defendants, i.e. a defendant is a resident of the state in which the federal court sits. Travelers Indem. Co. v. Sarkisian, 794 F.2d 754 (2nd Cir. 1986). Since protection against local prejudice is the purpose of removal jurisdiction based upon diversity of citizenship, a defendant cannot remove a New York state court case to federal court if the defendant resides in New York. 28 U.S.C. Sec. 1441(b).

In the case at bar, there are no local defendants, under diversity law. Both defendants are residents of, and citizens of Vermont only. Diversity of citizenship existed at the time the state court action was commenced, as well as at the time defendants removed the state court case to federal court.

The reference by plaintiff to defendants' insurance carrier is irrelevant to the issue of diversity. First, the carrier is not a party to

this action. Secondly, the carrier has no office in New York; its only office is in Montana (Exhibit "F").

Accordingly, there is complete diversity of citizenship between plaintiff and all defendants.

(c) Any alleged defects are not jurisdictional; amendment is warranted

Any alleged defects (which defects defendants expressly deny) do not oust the federal court of jurisdiction.

A defect will not make a notice of removal fatally flawed as long as the removal court can ascertain an adequate basis for removal. Harlem River Produce Co. v. Aetna Casualty & Surety Co., 257 F.Supp. 160 (S.D.N.Y. 1965). Defects in the form or content of the removal papers are usually not jurisdictional and may be cured by amendment after removal. Usatorres v. Marina Mercante Nicaraguenes, S.A., 768 F.2d 1285 (11th Cir. 1985).

Defendants have asserted in the Notice of Removal diversity jurisdiction. Even a failure to state a valid grounds for removal (and defendants have stated valid grounds) may be cured by amendment of the Notice, if jurisdiction existed at the time of removal. Gafford v. General Elec. Co., 997 F.2d 150 (6th Cir. 1993). That is particularly true as the allegations of diversity jurisdiction were not omitted. 28 U.S.C. 1653.

Removal based upon diversity is proper, even without the Notice specifying the place of incorporation and the location of the principal place of business. A defendant may amend the Notice of Removal to allege diversity with the requisite specificity. Any alleged defect is only "formal", since diversity in fact exists. Barrow Develop. Co. v. Fulton Ins. Co., 418 F.2d 316 (9th Cir. 1969).

Complete diversity of citizenship exists between the parties. As the case was removable based upon diversity of citizenship, this Court can exercise jurisdiction despite any alleged defects. Loftin v. Rush, 767 F.2d 800 (11th Cir. 1985).

(d) The case law cited by plaintiff is not pertinent

The case law cited by plaintiff's counsel in his Memorandum of Law does not support remand.

Plaintiff places emphasis upon subdivision (c) of section 1441, and states that "diversity alone is no longer a ground for removal" (Memorandum of Law, p. 11). Section 1441(c) allows for remand when state law predominates in a case in which removal was based upon a federal question under section 1331. In the case at bar, defendants removed to federal court based upon diversity of citizenship (not federal question) under section 1332 (not section 1331).

The cases cited by plaintiff are not relevant. For example, in the cases of Morales v. Meat Cutters Local 539, 778 F.Supp. 368 (E.D.Mich. 1991), Holland v. World Omni Leasing, Inc., 764 F.Supp. 1442 (N.D.Ala. 1991), and Martin v. Drummond Coal Co., Inc., 756 F.Supp. 524 (N.D.Ala. 1991), removal was effectuated based upon 28 U.S.C. 1331 and the fact that the actions presented federal questions. Remand was ordered where the degree of relation between state and federal claims was not sufficient.

By stark contrast, defendants in the case at bar removed based upon 28 U.S.C. 1332, based upon diversity. Section 1441(c) and issues of whether state law predominate are not relevant in the case at bar.

In Mason v. IBM, Inc., 543 F.Supp. 444 (M.D.N.C. 1982) and Lang v. American Elec. Power Co., Inc., 785 F.Supp. 1331 (N.D.Ind. 1992), remand was ordered because less than all defendants joined in, or consented to removal. In the case at bar, all defendants joined in the Notice of Removal - and plaintiff does not claim to the contrary.

In Mielke v. Allstate Ins. Co., 472 F.Supp. 851 (E.D.Mich. 1979) and Marler v. Amoco Oil Co. Inc., 793 F.Supp. 656 (E.D.N.C. 1992), the Notice of Removal was not timely filed. In the case at bar, the Notice was timely filed - and plaintiff does not claim to the contrary.

In Nichols v. Southeast Health Plan of Alabama, Inc., 859 F.Supp. 553 (S.D.Ala. 1993), the federal court remanded after federal pre-emption of a state court claim was rejected and subject matter jurisdiction was lost. On the other hand, there is no question that this Court has subject matter jurisdiction over plaintiff Fulfree's claims, as diversity jurisdiction exists.

CONCLUSION

There is no basis for remanding this case to state court. Removal is proper in all respects. Even if this Court finds any alleged defects, those defects are merely "formal", and not jurisdictional, and leave to amend the Notice of Removal accordingly is respectfully requested.

For all of the reasons stated herein, defendants respectfully request that plaintiff's Motion for an order remanding this case to the Supreme Court, Westchester County be denied.

WHEREFORE, it is respectfully requested that plaintiff's Motion be denied in its entirety, together with such other and further relief as to this Court seems just and proper.

Dated: October 18, 1995
New York, New York

Respectfully submitted,
KOPFF, NARDELLI & DOPF

By: [signed] Martin B. Adams
MARTIN B. ADAMS - 0825
Attorney for Defendants
440 Ninth Avenue
New York, New York 10001
(212) 244-2999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ELLEN P. FULFREE,

Plaintiff,

- against -

95 Civ. 7723 (DC)

ROBERT E. MANCHESTER and MANCHESTER LAW OFFICES, P.C.,

Defendants.

----------x

AFFIDAVIT OF ROBERT E. MANCHESTER

ROBERT E. MANCHESTER, ESQ. of Manchester Law Offices, P.C. deposes and says:

1. This affidavit is submitted solely to proffer evidence relating to the Plaintiff's allegations set forth in her motion to remand.

2. I moved to Vermont in 1969 upon graduation from law school. Since 1969 I have been a citizen, registered taxpayer and voter in this state. Since 1973 my residential address has been in Shelburne, Vermont. During 1969-1995 I have not owned property, paid taxes, voted or otherwise acted to establish or maintain a residence within the State of New York. Since 1969, I have not been a citizen of New York.

3. In 1981 when I agreed to represent the Plaintiff in the pending action, I was a member of Lisman & Lisman, a Vermont partnership. In 1983 I left Lisman & Lisman to form Manchester & O'Neill, P.C." a Vermont professional corporation. My partner, Jerome F. O'Neill, Esq., withdrew from Manchester & O'Neill, P.C., in 1987

whereupon I changed the name of the firm to Manchester Law Offices, P.C.

4. Since 1987, Manchester Law Offices, P.C., has remained a professional corporation incorporated in accordance with the laws of the State of Vermont.

5. Since its founding, Manchester Law Offices, P.C., (including Manchester & O'Neill, P.C.) has maintained a single business location in Burlington, Vermont. Between 1983-1987, the business address was 95 St. Paul Street. Since 1987, the business address has been 1 Lawson Lane.

6. Manchester Law Offices, P.C. is not incorporated with the State of New York and maintains no offices in New York. Exhibit A attached hereto is a true copy of the firm's 1983 Certificate of Incorporation filed with the Vermont Secretary of State.

7. Since 1983 Manchester Law Offices, P.C. (including Manchester & O'Neill, P.C.) has maintained all office and client files (including but not limited to all Dalkon Shield files) in its Vermont office. It has conducted all of its day to day work (whether administrative or relating to work done on a particular clients' case) in its Vermont office. It has filed income tax returns in Vermont and in no other state and has stated that all work done and income received is fully subject to taxation by Vermont as opposed to some other state.

8. In summary, at all times between the date the Plaintiff filed her action against me and the date of Plaintiff's motion to remand I have remained a citizen of Vermont. Further, my sole business location has remained in Vermont.

9. I am a member in good standing before courts of the following jurisdictions: State of Colorado since 1969; State of Vermont since 1970; United States District Court (D.Vt.) since 1970; U.S. Court of Appeals, 2d Circuit since 1973; United States District Court (N.D.N.Y.) since 1974; U.S. Court of Appeals, 4th Circuit since 1985; U.S. Court of Appeals, 10th Circuit since 1984; United States District Court (S.D.N.Y.) since 1994; United States District Court (E.D.N.Y.)

since 1994. See Exhibit B attached hereto which is a true copy of my certificate to practice before the Southern District of New York, dated April 26, 1994.

10. I agreed to represent the Plaintiff in an action for personal injuries against the A.H. Robins Co., Inc. in 1981. In connection with that effort I filed an action on her behalf in United States District Court (D.Md.) and thereafter obtained transfer of that action to the related multidistrict litigation (In re A.H- Robins Co., Inc. Dalkon Shield Litigation, MDL-211). Upon remand from MDL-211, I filed a separate action for the Plaintiff in the United States District Court (S.D.N.Y., docket no. 81 CIV 5116) which action was awaiting trial in August 1985 when the A.H. Robins Co., Inc. filed a Chapter 11 bankruptcy proceeding. In 1986 I filed a notice of claim on behalf of the Plaintiff in Richmond, Va. before the United States District Court, E.D.Va., and thereafter represented the Plaintiff before that court until March 11, 1992 when I obtained an order which lifted the stay and allowed the Plaintiff's case to proceed to trial in the Southern District.

11. Apart from listings in publications like Martindale Hubbell, neither I nor any member of Manchester Law Offices, P.C. (including Manchester & O'Neill, P.C.) has advertised in an effort to obtain clients, whether by radio, television, newspaper or other medium. Among other things I have not " ... actively solicited cases in the State of New York by a person who was employed [in New York] by the New York Post" (Fulfree Affidavit dated October 2, 1995, at 5).

12. My retainer agreement with Mrs. Fulfree permitted me to obtain the services of a "competent and qualified attorney in your state to assist with matters of a local nature." (See copy of agreement, attached hereto as Exhibit C). In Maryland, my local attorney was Michael Pretl, Esq. In New York, my local attorney was Paul Rheingold, Esq. Due to the nature of the transfer proceedings, no local attorney was required in MDL-211.

13. On January 6, 1995 I submitted a motion to withdraw as the attorney of record on behalf of the Plaintiff. On January 24, 1995 the Honorable John F. Keenan signed an order granting that motion.

Dated this 17th day of October 1995 at Burlington, Vermont.

MANCHESTER LAW OFFICES, P.C.

By: [signed] Robert E. Manchester
Robert E. Manchester
One Lawson Lane
P.O. Box 1459
Burlington, Vermont 05402
(802) 658-7444

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn and subscribed to before me this 17th day of October, 1995.

[Signed] Patricia A. Rasmussin
Notary Public

My commission expires 2/10/99

P:\CLIENTS\FULFREE\REMAFFIO.16

STATE OF VERMONT
OFFICE OF SECRETARY OD STATE

CERTIFICATE OF INCORPORATION

I certify that the attached is a true copy of the Articles of Incorporation of:

MANCHESTER & O'NEILL PROFESSIONAL CORPORATION

This certificate is conclusive evidence that all conditions required to be performed by the incorporators has been complied with and the Corporation is incorporated under the Vermont Business Corporation Act (11 V.S.A. Chapter 17).

[seal stamped]

July 1, 1983

[signed] Paul S. Gillies [?]
Deputy Secretary of State

ARTICLES OF ASSOCIATION
of
MANCHESTER & O'NEILL
Professional Corporation

We, the undersigned, natural persons of the age of twenty-one (21) years or more, acting as incorporators of a corporation under Chapter 3 of Title 11 of the Vermont Statutes Annotated and under the Vermont Business Corporation Act, adopt the following Articles of Association for such corporation:

FIRST: The name of the corporation is:
MANCHESTER & O'NEILL
Professional Corporation

SECOND: The period of its duration is perpetual.

THIRD: The purposes for which the corporation is organized are to engage in, conduct and carry on the practice of law and to do all things appropriate for the rendering and providing of legal services and services ancillary thereto.

FOURTH: The aggregate number of shares which the corporation shall have the authority to issue is: one class of 5,000 shares of common stock, par value $1.00 per share.

FIFTH: Provisions granting to shareholders the preemptive right to acquire additional or treasury shares of the corporation are: none.

SIXTH: Provisions for the regulation of the internal affairs of the corporation are: none, provided, however, that all of the shareholders may enter into an agreement concerning the composition and size of the Board of Directors, the establishment of special provisions concerning the voting of shares, and/or concerning the sale, transfer, assignment, or other encumbrance or disposal of shares of the corporation. If a copy of such agreement is filed with the corporation, such agreement shall be binding upon it and upon the shareholders.

SEVENTH: The address of the initial registered office of the corporation is 191 College Street, Burlington, Vermont, and the name of its initial registered agent at such address is Jerome F. O'Neill.

EIGHTH: The number of directors constituting the initial board of directors of the corporation is two (2), and the names and addresses of the persons who are to serve as directors until the first annual meeting of shareholders or until their successors are elected and shall qualify are:

Name	Address
Robert E. Manchester	P.O. Box 1459 Burlington, VT 05402
Jerome F. O'Neill	P.O. Box 1459 Burlington, VT 05402

NINTH :The names and addresses of the incorporators are: Robert E. Manchester, P.O. Box 1459, Burlington, Vermont 05402, and Jerome F. O'Neill, P.O. Box 1459, Burlington, VT 05402.

TENTH: The names and residence addresses of all of the original shareholders, directors and officers of the corporation are as follows:

Name	Residence Address
Robert E. Manchester	Shelburne, VT 05482
Jerome F. O'Neill	16 Summit Ridge Burlington, VT 05401

Dated at Burlington, County of Chittenden and State of Vermont, as of the first day of July, 1983.

[signed] Robert E. Manchester
Robert E. Manchester

[signed] Jerome F. O'Neill
Jerome F. O'Neill

[stamp-sealed certificate]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

I, JAMES M. PARKINSON, Clerk of the United States Southern District Court, do hereby certify that

ROBERT E. MANCHESTER

was duly admitted and qualified to practice as an Attorney in the District Court on the 26th day of APRIL, 1994.

In testimony whereof, Thereunto set my hand and affix the seal of said court, at my office in NEW YORK this 26th day of APRIL, 1994.

[signed] James M. Parkinson [?]
Clerk

LISMAN & LISMAN
ATTORNEYS AT LAW
121 COLLEGE STREET
BURLINGTON, VERMONT 05402
802-864-5756

June 15, 1981

Ms. Ellen Surlak
115 Bennett Avenue
Yonkers, NY 10701

Dear Ellen:

You have asked my office to initiate an investigation on your behalf and thereby seek to prove that the Dalkon Shield IUD has caused you medical injuries and complications. You have furnished my office with medical authorizations and names and addresses of health care organizations and professions whom we have contacted to obtain copies of medical records. We now have copies of those records listed on the attached page.

Based on examination of your records and the information you have furnished, my opinion is you have a proper claim to make against the A.H. Robins Company, Inc., the manufacturer of the Dalkon Shield. I believe initiation of a claim and lawsuit will result in a successful recovery for you. In my opinion, your recovery will substantially exceed any expenses which may be incurred in the preparation of your case. Based on the value of settlements and verdicts in similar claims against the A.H. Robins Company and the extent and nature of your injuries, I expect to recover adequate compensation for you and also expect that punitive damages may be available in your case.

As a result of other cases and claims I have handled against the A.H. Robins Company, I believe suit should be filed promptly in your jurisdiction so that further delay is avoided insofar as the statute of limitations is concerned. We can expect the A.H. Robins Company to raise a statute of limitations defense in your case, as it does now in practically all cases, although I believe the law of your jurisdiction will

permit you to proceed with your claim against the manufacturer.

In my earlier letter to you I described our fee schedule, but I would like to state it again for you so you may ask me any questions that you may have. I will agree to represent you on the basis of a contingent fee agreement. This means you will owe me no attorneys' fees whatsoever unless a successful recovery occurs in this matter. If settlement results before or upon the filing of the suit but before substantial trial preparation in your individual case, then the contingent fee will be one third of the gross recovery. If we are required to begin substantial trial preparation for your individual case, then the contingent fee basis will be forty percent of the gross recovery. If an appeal is required, then you and I will reserve the right to negotiate a fee for that appeal.

Expenses incurred in your individual case will be deducted from the gross settlement at the time of disbursement. I will keep you periodically informed of all such expenses but do not believe they will be large unless I am required to actually try your case. The trial in some cases has taken over three months, but we expect our current trial preparation for all clients to reduce substantially the length of trial in your case. Nevertheless, we must be prepared for a lengthy trial since Robins' tactics include attempting to tire and wear out the plaintiffs.

In addition to the individual expense, in case of settlement or verdict, we will also expect you (as we have all individual Dalkon Shield clients) to bear a portion of the group expenses. These expenses relate to the research which we have conducted at MIT, Harvard and other facilities. This amount will vary, based upon both the numerator and denominator of my individual cases at the time of settlement. At present each client's group expense has amounted to $2,000. I expect in the future this amount will not substantially increase and may well decrease.

Dalkon Shield cases like yours require careful preparation and investigation. I will retain total control of your case and will be lead counsel at time of trial. I will, however, want to obtain the assistance of a competent and qualified attorney in your state to assist with matters of a local nature. I may also have one of my co-counsel in the IUD

recall case in Boston participate. Such attorneys, to the extent they are involved in your case, will be paid by me, and you will have no further legal fees or expenses as a result. Nevertheless, in my best judgment, the assistance of such other attorneys will enhance the settlement value or jury verdict of your case.

I would like to place your case in suit in the near future in Federal Court in your state. If you have any questions or concerns with regard to this letter, I would be happy to speak with you at your convenience.

For my files, I would appreciate your signature, indicating your acceptance of this letter proposal and your request for me to commence a lawsuit as described above on your behalf. I will look forward to hearing from you and would appreciate your returning this letter to me at your earliest opportunity. A copy of the letter is enclosed for your file.

Very truly yours,

[signed] Bob Manchester
Robert E. Manchester

I accept the terms of this letter proposal and request that you commence a lawsuit on my behalf as described in this letter.

Date: June 24, 1981

[signed] Ellen P. Surlak

(PLACE AN x IN ONE BOX ONLY) ORIGIN
x 2 Removed from State Court

(PLACE AN x IN ONE BOX ONLY) BASIS OF JURISDICTION
x 4 Diversity -> IF DIVERSITY, INDICATE CITIZENSHIP BELOW. (28 USC 1332, 1441)

CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY)

(Place an [x] in one box for Plaintiff and one box for Defendant)

CITIZEN OF THIS STATE PTF X
CITIZEN OF ANOTHER STATE DEF X

PLAINTIFF(S) ADDRESS(ES) AND COUNTY(IES) (Calendar Rule 4(A))

115 Bennett Avenue
Yonkers, NY

DEFENDANT(S) ADDRESS(ES) AND COUNTY(IES) (Calendar Rule 4(A))

Manchester Law Offices
One Lawson Lane
Burlington, Vermont

Robert Manchester
Five Pond Road
Shelburne, Vermont

Check one: THIS ACTION SHOULD BE CLASSIFIED:
x Standard

Check one: THIS ACTION SHOULD BE ASSIGNED TO: x FOLEY SQUARE

Date 6 Sept. 1995 Signature of Attorney of Record
ADMITTED TO PRACTICE IN THIS DISTRICT x YES
(DATE ADMITTED Mo. 11 Yr. 86)
Receipt # [signed] M B Adams [hand printed] Martin B. Adams - 0825
Attorney Bar Code #

UNITED STATES DISTRICT COURT (NEW YORK SOXXXX)
[covered]

RICHARD W. FULFREE
ATTORNEY AT LAW
TREETOPS CARRIAGE HOUSE
612 EAST GRASSY SPRAIN ROAD
YONKERS, NEW YORK 10710

September 13, 1995

Clerk
U.S. District Court for the Southern District of New York
40 Foley Square
New York, New York 10007

Re: Ellen P. Fulfree v. Robert Manchester and
Manchester Law Offices
Docket No. 95 CIV. 7723 (DC)

Dear Sir,

I am in receipt of a Notice filed with your office and received by us on September 12, 1995. The notice is one removing the above referenced case from the Supreme Court, Westchester County to the United States District Court for the Southern District of New York at Foley Square.

Pursuant to the Rule 21 of the Southern District Court of New York, I am designating on behalf of the plaintiff, the White Plains Southern District Courthouse as the forum to handle this matter.

Obviously, since the matter was transferred to this court by the defendant, the plaintiff does not have the opportunity to designate on a civil cover sheet this request for designation.

The nature of removal and affidavit attached concedes the plaintiff's residence as 115 Bennett Avenue, Yonkers, New York, and the major part of this action arose in New York State.

Please advise as to when the matter has been or will be transferred to White Plains.

I am enclosing a stamped self-addressed envelope for your reply.

Yours truly,
[signed] Richard W. Fulfree
RICHARD W. FULFREE

[stamped] RECEIVED Sep 18, 1995
KOPFF, NARDELLI & DOPF

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

ELLEN P. FULFREE,

NOTICE OF FILING
NOTICE OF REMOVAL
Index No. 95-13051

Plaintiff,

-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants.

----------x

TO: CLERK OF THE COURT:

YOU WILL PLEASE TAKE NOTICE, that defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES have filed in the United States District Court for the Southern District of New York, 40 Foley Square, New York, New York 10007 a Notice of Removal of this Supreme Court action to the District Court of the United States, Southern District of New York, 40 Foley Square, New York, New York 10007.

A true and correct copy of the Notice of Removal is attached to this notice. The filing of this notice and copy of Notice of Removal with the Clerk of the Supreme Court of the State of New York, County of Westchester, effects a removal to the District Court of the United States, and the Supreme Court of the State of New York, County of Westchester may proceed no further, unless this case is remanded. 28 U.S.C. 1446(d).

Dated: September 11, 1995

New York, New York

Respectfully submitted,

KOPFF, NARDELLI & DOPF

By: [initialed] Martin B. Adams
MARTIN B. ADAMS
Associated with the Firm
Attorneys for Defendants
440 Ninth Avenue
New York, New York 10001
(212) 244-2999

TO: RICHARD W. FULFREE, ESQ.
Attorney for Plaintiff
612 East Grassy Sprain Road
Yonkers, N.Y. 10710

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ELLEN P. FULFREE,

AMENDED
NOTICE OF REMOVAL

Docket No. 95-13051

Plaintiff,

-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants.

----------x

Defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES hereby file this Notice of Removal of the above-described action to the United States District Court for the Southern District of New York, 40 Foley Square, New York, New York 10007 from the Supreme Court of the State of New York, County of Westchester, where the action is now pending, as provided by Title 28, U.S.C. Chapter 89, and state:

1. This cause was commenced in the Supreme Court of the State of New York, County of Westchester by filing of a Summons and Complaint on or about August 15, 1995, and process was served upon removing defendants on August 23, 1995. A copy of plaintiff's complaint is annexed hereto as Exhibit "A".

2. The action is a civil action for compensatory damages based upon alleged lawyer malpractice.

3. The ground for removal is that diversity jurisdiction exists,

as there is complete diversity of citizenship and the amount in controversy exceeds the sum or value of $50,000.

4. Plaintiff contends this matter in dispute exceeds the sum of fifty thousand dollars ($50,000) exclusive of interest and costs.

5. At the time of commencement of this action and at the time of removal: Plaintiff was a citizen of New York and resided at 115 Bennett Avenue, Yonkers, New York. Defendant MANCHESTER LAW OFFICES was and still is a citizen of Vermont, is deemed to have a residence at One Lawson Lane, Burlington, Vermont 05401, is incorporated only in Vermont, and has a principal place of business only in Vermont at the above address. Defendant ROBERT MANCHESTER was and still is a citizen only of Vermont and resides at 5 Pond Road, Shelburne, Vermont 05482.

6. A copy of all pleadings, process, and orders served upon defendants is filed with this notice.

7. Defendants will give written notice of the filing of this notice as required by 28 U.S.C. Section 1446(d).

8. A copy of this notice will be filed with the Clerk of the Supreme Court of the State of New York, County of Westchester, as required by 28 U.S.C. Section 1446(d).

9. This notice of removal is being filed within thirty days after the receipt by defendants of a copy of the initial pleading setting forth the claim for relief upon which the action is based. 28 U.S.C. Section 1446(b).

WHEREFORE, defendants ROBERT MANCHESTER and MANCHESTER LAW OFFICES respectfully request that this action proceed in this Court as an action properly removed to it.

Dated: October 18, 1995
New York, New York

Respectfully submitted,

KOPFF, NARDELLI & DOPF

By: [signed] Martin B. Adams
MARTIN B. ADAMS - 0825
Attorney for Defendants
440 Ninth Avenue
New York, New York 10001
(212) 244-2999

TO: RICHARD W. FULFREE, ESQ.
Attorney for Plaintiff
612 East Grassy Sprain Road
Yonkers, N.Y. 10710

ALPS
ATTORNEYS LIABILITY PROTECTION SOCIETY
A MUTUAL RISK RETENTION GROUP
SUITE 109, THE FLORENCE BUILDING, P.O. BOX 9169,
MISSOULA, MT 59807-9169
(406) 728-3113, FAX: (406) 728-7416

October 16, 1995

Mr. Martin B. Adams
KOPFF, NARDELLI & DOPF
440 ninth Avenue
New York, New York 10001-1688

Re: ALPS Claim No. A95543 - Ellen P. Fulfree vs Robert E. Manchester

Dear Martin:

The only office maintained by ALPS is in the State of Montana. ALPS has no office in the State of New York nor any other state.

If I can be of further assistance, please let me know.

Sincerely,

ATTORNEYS LIABILITY PROTECTION SOCIETY

[signed] Robyn D. Jarnagin
ROBYN D. JARNAGIN
Claims Examiner
Claims Hotline: 1-800-367-4366

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[handprinted] SDNY 95-CV-7723 Judge Chin

SUMMARY ORDER

THE SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of October one thousand nine hundred and ninety-six.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE PIERRE N. LEVAL,
HONORABLE WILLIAM A. NORRIS*,
Circuit Judges.

[stamped] United States Court of Appeals Second Circuit
Filed Oct 4, 1996
George Lange[xxx], Clerk

ELLEN P. FULFREE

Plaintiff-Appellant
No. 96-7095

- v. -

ROBERT MANCHESTER and [illegible]HESTER LAW OFFICES,

Defendants-Appellees.

Appearing for Appellant: Richard W. Fulfree, Yonkers, N.Y.

Appearing for Appellees: Martin B. Adams, N.Y., N.Y.

[stamped] Received Oct 31 1996

Appeal from the United States District Court for the Southern District of New York.

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* Honorable William A. Norris, of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

[labeled] ISSUED AS MANDATE. 10/29/96

28 US Code 1443

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 US Code 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section

1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title-

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not a joined as a party-defendant, such insurer shall be deemed a citizen of the State in which the insurer has been incorporated and of the State where it has its principal place of business.

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 US Code 2101

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in

part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorar to review a decision of the United States Court of Military Appeals shall be as prescribed by the rules of the Supreme Court.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not

precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c) (1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include

all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States District Court in which the notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States District Court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after such filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshall shall thereupon take such defendant into his custody and deliver a copy of the writ to the clerk of such State court.

28 US Code 1447 provides as follows:

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

Fourteenth Amendment to U.S. Constitution, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws.

Fifth Amendment to U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 11 of the Rules of Civil Procedure

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose

upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

28 US Code 1331

§ 1331. Federal question.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 US Code 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 US Code 1738

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession

thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 US Code 1441

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters

in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

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OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

ELLEN P. FULFREE,

Petitioner,

against

ROBERT MANCHESTER and
MANCHESTER LAW OFFICES,

Respondent,

Supplemental Appendix for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL APPENDIX FOR WRIT OF CERTIORARI

MORTON N. WEKSTEIN
Attorney for Petitioner
612 E. Grassy Sprain Road
Yonkers, New York 10710
(914) 961-7500

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OF RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of October one thousand nine hundred and ninety-six.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE PIERRE N. LEVAL,
HONORABLE WILLIAM A. NORRIS,*
Circuit Judges.

ELLEN P. FULFREE,

Plaintiff-Appellant,

- v. -

No. 96-7095

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendant-Appellees.

Appearing for Appellant: Richard W. Fulfree, Yonkers, N.Y.
Appearing for Appellees: Martin B. Adams, N.Y., N.Y.

Appeal from the United States District Court for the Southern District of New York.

---

* Honorable William A. Norris, of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Fulfree v. Manchester, No. 96-7095

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal is dismissed for lack of appellate jurisdiction.

Plaintiff Ellen P. Fulfree appeals from an order entered in the United States District Court for the Southern District of New York, Denny Chin, Judge, denying her motion to remand this action to the state court from which it was removed. We dismiss the appeal for lack of appellate jurisdiction. An order of the district court denying a motion to remand an action to state court is an interlocutory order that is not immediately appealable pursuant to 28 U.S.C. § 1291. See, e.g., Wilkins v. American Export-Isbrandtsen Lines, Inc., 401 F.2d 151 (2d Cir. 1968). We reject plaintiff's argument that, simply because 28 U.S.C. § 1447 provides that certain orders granting remands are not appealable, an order denying a remand is appealable immediately. No case has so held, and, in light of the statutory structure governing appeals, see 28 U.S.C. §§ 1291, 1292, and the strong federal policy against piecemeal appeals, see generally Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989); Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 8 (1980); that is not a reasonable interpretation of the statute. The cases on which plaintiff relies in support of her jurisdictional arguments involved either final judgments, which are made appealable by § 1291, or orders granting or denying preliminary injunctions, which are made immediately appealable by §1292(a). No final judgment has been entered in the present case, and no motion for an injunction is at issue. There being no statutory basis for the present appeal, we lack jurisdiction to hear the appeal.

We have considered all of Fulfree's arguments in support of immediate appealability and have found them to be without merit. The appeal is dismissed for lack of jurisdiction.

AMALYA L. KEARSE, U.S.C.J.

PIERRE N. LEVAL, U.S.C.J.

WILLIAM A. NORRIS, U.S.C.J.

No. 96-1560 (4)

Supreme Court, U.S.
FILED
APR 11 1997
THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

ELLEN P. FULFREE,

Petitioner,

against

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES K. FAILLACE*
Attorney for Respondents
440 Ninth Avenue
New York, NY 10001
(212) 244-2999

* Counsel of Record

THE REPORTER COMPANY AND THE WALTON REPORTER, INC.
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Counterstatement of Questions Presented

I. Whether this Court should grant certiorari to review the Memorandum Decision and Order of the United States District Court dated January 2, 1996, which is an interlocutory order from which there is no right of immediate appeal?

II. Whether this Court should grant certiorari to review petitioner's Motion to remand to the state court, even though removal applies to diversity actions and the trial Court properly exercised its broad discretion in denying petitioner's Motion and granting respondents leave to amend the Notice of Removal?

III. Whether this Court should grant certiorari to review a Summary Order of the United States Court of Appeals for the Second Circuit dismissing petitioner's appeal for lack of appellate jurisdiction?

Respondents respectfully answer these questions in the negative.

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No. 96-1560

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

ELLEN P. FULFREE,

Petitioner,

-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

Respondent Robert Manchester is an attorney who has been a citizen, registered taxpayer, and voter in Vermont since 1969. Respondent has not been a citizen of New York since 1969 (A. 94).

Respondents agreed to represent petitioner in 1981, when respondent Robert Manchester was a member of a Vermont

partnership (A. 94-95). Mr. Manchester left that partnership in 1983 to form a own professional corporation in Vermont (A. 95).

Respondent Manchester Law Offices is a citizen only of Vermont. It is incorporated in Vermont and has its principal place of business in Vermont. (A. 95).

Respondents' only office is in Vermont. The day-to-day control of the cases takes place at the Vermont office, the files are kept in Vermont, and all administrative functions take place in Vermont, since that is where the sole office is located (A. 95-96).

Respondents agreed to represent petitioner in an action for personal injuries against the A.H. Robins Co., Inc. in 1981. An action was filed in the United States District Court for the District of Maryland. The action was then transferred to the related multidistrict litigation (A. 96).

Upon remand from the multidistrict litigation, respondents filed a separate action for petitioner in the United States District Court for the Southern District of New York. The action was awaiting trial when A.H. Robins Co., Inc. filed for bankruptcy (A. 96-97).

A Notice of Claim was filed by respondents on behalf of petitioner in the bankruptcy proceedings. Respondents obtained an order lifting the stay and allowing petitioner's case to proceed to trial in the United States District Court for the Southern District of New York (A. 97).

On January 6, 1995, respondents filed a motion to withdraw as attorney of record for petitioner (A. 42-43). Judge Keenan signed an order granting the motion (A. 98).

Petitioner commenced this lawyer malpractice action against respondents by filing a summons and complaint in the Supreme Court, Westchester County on or after August 15, 1995 (A. 16). Respondents duly filed a Notice of Removal on September 7, 1995 removing this action to the United States District Court for the Southern District of New York (A. 68-70).

The basis for subject matter jurisdiction in the United States District Court for the Southern District of New York is that complete diversity of citizenship exists, and the amount in controversy exceeds the sum or value of $50,000. 28 U.S.C. 1332. Petitioner, a resident and citizen of New York, claims respondents, who are residents and citizens of Vermont, committed legal malpractice.

Petitioner moved to remand the case to the Supreme Court, Westchester County (A. 49). Respondents duly opposed the motion, and requested leave to serve an amended notice of removal (A. 82-87).

By Memorandum Decision and Order dated January 2, 1996, the United States District Court denied petitioner's Motion, and granted respondents leave to file an amended notice of removal (A. 5-8). Respondents duly served and filed the Amended Notice of Removal (A. 44-46).

Petitioner filed a Notice of Appeal from the Memorandum Decision and Order of the United States District Court dated January 2, 1996. Petitioner did not make any written application

for certification of the District Court's Order under 28 U.S.C. 1292(b).

Respondents then advised petitioner that the Order of the United States District Court is an interlocutory order from which there is no right to immediate appeal. Respondents requested that petitioner withdraw her appeal (A. 47).

By Order dated February 2, 1996, the United States Court of Appeals for the Second Circuit dismissed petitioner's appeal based upon petitioner's failure to file and serve a Pre-Argument Statement and serve a Form D Statement. Petitioner then moved in the United States Court of Appeals for the Second Circuit for an order treating her appeal as a mandamus application,excusing late filing of Preargument Statements C and D, and allowing the forms to be filed *nunc pro tunc*.

By Order dated March 1, 1996, the United States Court of Appeals for the Second Circuit granted petitioner's motion only to the extent that the dismissal of the appeal for failure to timely file Forms C and D is vacated and the appeal is reinstated.

By correspondence dated March 11, 1996, respondents again advised petitioner that there is no right of immediate appeal from the Memorandum Decision and Order dated January 2, 1996, and that petitioner was denied leave to treat the appeal as a mandamus application. Withdrawal of the appeal was requested (A. 48). Petitioner decided to continue to pursue her appeal.

By Summary Order filed October 4, 1996, the United States Court of Appeals dismissed petitioner's appeal for lack of appellate jurisdiction. The Court of Appeals held that an order of a district court denying a motion to remand an action back to

state court is an interlocutory order that is not immediately appealable under 28 U.S.C. §1291.

REASONS FOR DENYING THE WRIT

I. The Order of the District Court denying remand of this diversity action commenced in state court is an interlocutory order from which direct appeal cannot be taken.

The Memorandum Decision and Order of the United States District Judge dated January 2, 1996 is an interlocutory order from which there is no right of immediate appeal. There are no special or important reasons for review of the dismissal of this appeal for lack of appellate jurisdiction: There is no conflict among the Circuits and there are no novel or important questions with respect to the absence of appellate jurisdiction with respect to an interlocutory order such as an order denying a motion to remand to state court.

Petitioner's instant appeal is not authorized by any statute. Section 1447(d) of Title 28, upon which section petitioner relies for the claim that she may appeal from the Order denying her motion to remand to state court, allows appellate review of an order "remanding a case to the State court from which it was removed pursuant to section 1443 of this title..."

The Memorandum Decision and Order of the United States District Court dated January 2, 1996 is not an order "remanding a case to the State court..." To the contrary: The Memorandum Decision and Order denied remand.

Also, this case was not "removed pursuant to section 1443..." Section 1443 pertains to removal of civil rights claims. The case

at bar is not a civil rights case, and was not removed pursuant to section 1443.

This case is a diversity action sounding in alleged lawyer malpractice, and was removed pursuant to section 1441. Under section 1441(a), any civil action brought in a state court of which the United States district court has original jurisdiction may be removed.

The United States District Court for the Southern District of New York has original jurisdiction of petitioner's state court action [commenced in Supreme Court, Westchester County] because of diversity of citizenship and the amount in controversy. 28 U.S.C. 1332.

Petitioner has other adequate means to attain the relief she seeks: The Memorandum Decision and Order denying remand is reviewable on any appeal from the final judgment. See, e.g., *Ex parte Hoard*, 195 U.S. 578, 15 Otto 578, 26 L.Ed. 1176 (1881); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860 (7th Cir. 1984). The rule making an order denying remand not reviewable on appeal is to avoid undue delay and interruption of litigation.

In addition, petitioner did not made any written application for certification of the District Court's Order under 28 U.S.C. 1292(b). Nor was there any basis for certification, since there is no substantial difference of opinion as to any controlling question of law.

Petitioner's application to treat this appeal as a mandamus application was denied by Order of the United States Court of Appeals dated March 1, 1996. There is no appellate jurisdic-

tional basis for the United States Court of Appeals to adjudicate petitioner's instant appeal.

Petitioner will not suffer any damage or prejudice in a way not correctable on appeal, as a result of the denial by the United States Court of Appeals of appellate review. There are no other lawsuits between the parties; the instant action is the only lawsuit. Nor did petitioner identify or even claim in the trial Court any prejudice or damage.

Nor does the Memorandum Decision and Order of the United States District Court raise any new or important problems, or any issues of law of first impression. Appellate review of the interlocutory Memorandum Decision and Order of the United States District Court dated January 2, 1996 would not advance any determination of, or construction of a federal procedural rule in a new context.

Petitioner is not damaged or prejudiced in any way not correctable on appeal. The need for petitioner to incur the cost of further litigation below before finding out whether the district court properly denied the motion to remand is not the type of prejudice that justifies immediate appellate review of an order denying a motion to remand. *Rohrer, Hibler & Replogle, Inc. v. Perkins*, supra, 728 F.2d 860, 862.

II. Petitioner's appeal was dismissed without consideration of the merits of the appeal

The United States Court of Appeals for the Second Circuit dismissed petitioner's appeal for lack of appellate jurisdiction. No decision or order was issued by the Court of Appeals with respect to the merits of petitioner's appeal.

In petitioner's petition for writ of certiorari, Questions 2-6 presented by petitioner pertain to issues which, while raised by petitioner in the Court of Appeals, were not considered by the Court of Appeals in issuance of the Summary Order dismissing the appeal for lack of appellate jurisdiction. This Honorable Court should give no consideration to Questions 2-6 in petitioner's petition, but instead should leave the issues for the consideration of the courts below if duly presented by petitioner.

This Honorable Court gives no consideration to issues in the record that are not considered by the Court of Appeals. Instead, this Honorable Court leaves those issues to be considered for what they are worth by the courts below. *F.T.C. v. Travelers Health Association*, 302 U.S. 293, 80 S.Ct. 717 (1960).

A writ of certiorari is improvidently granted if the issues are not ruled upon in the court below. *Mishkin v. State of New York*, 383 U.S. 502, 86 S.Ct. 958 (1965). Questions 2-6 of petitioner's petition were not adjudicated by the Court of Appeals, as the appeal was dismissed for lack of appellate jurisdiction. This Honorable Court should decline to reach the merits of petitioner's appeal.

III. The dismissal of petitioner's appeal for lack of appellate jurisdiction does not deprive petitioner of any Constitutional right

The dismissal of petitioner's appeal for lack of appellate jurisdiction does not deprive petitioner of either due process or equal protection.

Contrary to petitioner's contention, there is a rational basis for dismissing the appeal rather than issuing an order, "Affirmed without opinion". An affirmation, even if "without opinion", is

an implicit acknowledgement of appellate jurisdiction over the appeal.

In this appeal, the order from which appeal is taken is an interlocutory order that is not immediately appealable under section 1291 of Title 28 of the United States Code. It is rational for the Court of Appeals to dismiss an appeal for lack of appellate jurisdiction [which dismissal has no precedental value with respect to the merits of the appeal] rather than to affirm without opinion [which would be an adjudication of the merits of the appeal].

Petitioner has not been deprived of any due process or equal protection right. Petitioner is entitled to appeal from the final judgment and raise on that appeal the validity of the Order of the District Court denying petitioner's motion to remand. *Air Line Pilots Association, Int'l v. UAL Corp.*, 897 F.2d 1394 (7th Cir. 1990).

In addition, petitioner did not made any written application for certification of the District Court's Order under 28 U.S.C. 1292(b). Petitioner cannot complaint of deprivation of constitutional rights, when petitioner did not even avail herself of rights that were available!

Petitioner refers to the Order of the United States Court of Appeals as a "secret disposition" (Petition, p. 17). Yet, there is nothing "secret" about the disposition: The Court of Appeals gave a thorough discussion of the reason why it lacked appellate jurisdiction.

IV. This action was properly removed from state court to the United States District Court, under diversity jurisdiction

Diversity jurisdiction exists in this case. Removal to federal court was properly based upon diversity jurisdiction. No special, important, or novel question exists as to removal of actions based upon diversity jurisdiction exists that would warrant review by this Honorable Court of this appeal.

Any case that could have been commenced in federal court based on diversity of citizenship can be removed from state court on that ground. 28 U.S.C. 1441(a, b).

Remand is allowable if there is lack of subject matter jurisdiction or there is a defect in the removal procedure. Here, there are no defects warranting remand, and there is complete diversity of citizenship. Petitioner is a citizen of New York, and both respondents are citizens of Vermont.

Respondent Manchester is a citizen of Vermont (A. 94). Respondent Manchester Law Offices is incorporated in Vermont and has a principal place of business in Vermont (A. 95, 99). Accordingly, Manchester Law Offices is a citizen only of Vermont. 28 U.S.C. 1332(c).

There is no conflict among the Circuit Courts as to the ability of a defendant to remove from state court to federal court a lawsuit based upon diversity jurisdiction. Nor is any substantial question raised by petitioner as to the removability of this diversity action.

Petitioner is incorrect, as a matter of law, in claiming that respondents have no authority to remove this case to federal court, and that the District Court has no authority to deny the

motion to remand. There is no authority to support petitioner's position; there is no controversy or question in any Circuit that section 1441 of Title 28 of the United States Code allows removal of cases based upon diversity rather than federal question jurisdiction.

Petitioner relies upon subsection (c) of section 1441. That section provides as follows:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Petitioner argues that since there is nothing in the complaint hinting of a federal question, removal is prohibited.

In her petition, petitioner has raised and then demolished a "straw man". Subsection (c) of Section 1441 applies when jurisdiction is conferred by section 1331 ["Federal question" jurisdiction]. In that case, remand is permitted when state law predominates over the federal questions.

The case at bar is a diversity action—not a "federal question" action. Subject matter jurisdiction is conferred based upon diversity of citizenship [Section 1332], and not based upon any federal question [Section 1331].

The case at bar was removed pursuant to Section 1441(a), and not pursuant to Section 1441(c). Under section 1441(a), any civil action brought in a state court of which the United States

district court has original jurisdiction may be removed. The United States District Court for the Southern District of New York has original jurisdiction of plaintiff-appellant's state court action [commenced in Supreme Court, Westchester County] because of diversity of citizenship and the amount in controversy. 28 U.S.C. 1332.

The statutory construction provided by petitioner is faulty, as a matter of law, and has not been adopted in any federal Circuit. The removal of this case to the United States District Court, and the District Court's denial of petitioner's motion to remand, comport with the removal statute and present no substantial, important, or novel question for review.

V. The United States District Court possesses full power to grant leave to serve an amended notice of removal

Remand for procedural defects rests in the sound discretion of the federal court. Every step taken by respondents to remove has been in strict accordance with the federal statutes and rules.

There are no substantial, novel, or important questions of law for this Honorable Court to consider in this appeal with respect to the amended notice of removal. None of the alleged defects in the Notice of Removal were fundamental. There is no split of authority among the Circuits that would warrant a grant of a writ of certiorari on the issues raised in this appeal with respect to removal.

A defect will not make a notice of removal fatally flawed as long as the removal court can ascertain an adequate basis for removal. *Harlem River Produce Co. v. Aetna Casualty & Surety Co.*, 257 F.Supp. 160 (S.D.N.Y. 1965). Defects in the form or content of the removal papers are usually not jurisdictional and

may be cured by amendment after removal. *Usatorres v. Marina Mercante Nicaraguenes*, S.A., 768 F.2d 1285 (11th Cir. 1985).

Respondents have asserted in the Notice of Removal diversity jurisdiction. Even a failure to state a valid grounds for removal (and defendants-appellees have stated valid grounds) may be cured by amendment of the Notice, if jurisdiction existed at the time of removal. *Gafford v. General Elec. Co.*, 997 F.2d 150 (6th Cir. 1993). That is particularly true as the allegations of diversity jurisdiction were not omitted. 28 U.S.C. 1653.

Removal based upon diversity is proper, even without the Notice specifying the place of incorporation and the location of the principal place of business. A defendant may amend the Notice of Removal to allege diversity with the requisite specificity. Any alleged defect is only "formal", since diversity in fact exists. *Barrow Develop. Co. v. Fulton Ins. Co.*, 418 F.2d 316 (9th Cir. 1969).

Complete diversity of citizenship exists between the parties. As the case was removable based upon diversity of citizenship, the trial Court properly exercised jurisdiction despite any alleged defects. *Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1985). The granting of leave to amend the Notice of Removal was a proper exercise of the trial Court's broad discretion, and presents no issues worthy of review.

(a) The amended notice of removal was timely served

Petitioner is incorrect to claim and infer that either the Notice of Removal or Amended Notice of Removal are untimely (Petitioner's Petition, p. 18).

The summons and complaint was filed in the Supreme Court, Westchester County on or after August 15, 1995, and process was served upon removing defendants-appellees on August 23, 1995 (A. 11). The original Notice of Removal was filed on September 7, 1995 [A. 11]—well within the 30-day time limit.

A proposed amended notice of removal was attached to respondents' Affirmation dated October 18, 1995 in opposition to petitioner's Motion to remand (A. 111). Leave to serve the amended notice of removal was requested in the Affirmation dated October 18, 1995 (A. 86-87).

By Memorandum Decision and Order dated January 2, 1996, the United States District Court granted leave to file the amended notice of removal within 20 days of the order (A. 8). The amended notice of removal was served and filed by January 6, 1996, in conformity with the Order of the United States District Court. Accordingly, the Amended Notice of Removal was timely and properly served and filed.

(b) Defense counsel complied with Rule 11, FRCP

Defense counsel's signature appears in his individual name, as required by section (a) of Rule 11. That Rule does not require that owners of the lawfirm sign the document; it requires only that the document be signed "by at least one attorney of record in the attorney's individual name..."

When petitioner's counsel objected in the trial Court to the sentence, "Associated with the Firm" that appeared in defense counsel's signature block, defense counsel deleted the sentence from the signature block. This deletion cured the objection raised by petitioner's counsel.

Petitioner's counsel also criticized defense counsel's signature, even though the name was typed underneath. Defense counsel promised petitioner's counsel that defense counsel will sign his name in a neater fashion in the future, and has done so.

(c) *Service of the Notice of Removal*

Petitioner is incorrect to claim that the Notice of Removal is defective based upon service of the Notice (Petitioner's Petition, p. 21). Section 1446(d) provides that a copy of the Notice shall be filed with the clerk of the State court. That was done here: The caption of the Notice of Filing Notice of Removal clearly indicates that the Notice is being filed in the "Supreme Court of the State of New York, County of Westchester", and is directed to the Clerk of the Court (A. 109).

A copy of the Notice of Removal was filed with precisely the individual who the statute says must receive a copy: The Clerk of the Supreme Court of the County of Westchester.

(d) The situs of removal

Petitioner takes respondents to task for not setting forth the "division" to which removal is sought (Petition, p. 22). Petitioner's contention lacks any merit.

The Notice of Removal was filed in the proper District. Removal was effectuated to the Southern District, which has courts held at New York and White Plains (A. 11-13).

The 1996 Edition to the Federal Civil Judicial Procedure and Rules (West Publishing Co.) does not indicate that the Southern District is divided into divisions. Id. at p. 536. Contrast that

with, for example, Minnesota (which "constitutes one judicial district comprising six divisions"). Id. at p. 532.

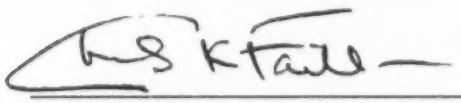
The Civil Cover Sheet merely asks which location to which the case should be assigned (A. 107). Respondents selected Foley Square, as the underlying personal injury action on which this legal malpractice action is based is venued in the Southern District, Foley Square.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
March 17, 1997

Respectfully submitted,



CHARLES K. FAILLACE
Attorney for Respondents
440 Ninth Avenue
New York, New York 10001
(212) 244-2999

APPENDIX A—Order of the United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of October one thousand nine hundred and ninety-six.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE PIERRE N. LEVAL,
HONORABLE WILLIAM A. NORRIS*,

Circuit Judges.

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*Honorable William A. Norris, of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

---x

ELLEN P. FULFREE,

Plaintiff-Appellant,

- v. -

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants-Appellees.

---x

Appearing for Appellant: Richard W. Fulfree, Yonkers, N.Y.
Appearing for Appellees: Martin B. Adams, N.Y., N.Y.

Appeal from the United States District Court for the Southern District of New York.

ISSUED, AS MANDATE
10/29/96

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal is dismissed for lack of appellate jurisdiction.

Plaintiff Ellen P. Fulfree appeals from an order entered in the United States District Court for the Southern District of New York, Denny Chin, *Judge,* denying her motion to remand this action to the state court from which it was removed. We dismiss the appeal for lack of appellate jurisdiction. An order of the district court denying a motion to remand an action to state court is an interlocutory order that is not immediately appealable

pursuant to 28 U.S.C. § 1291. *See, e.g., Wilkins v. American Export-Isbrandtsen Lines, Inc.*, 401 F.2d 151 (2d Cir. 1968). We reject plaintiff's argument that, simply because 28 U.S.C. § 1447 provides that certain orders granting remands are not appealable, an order denying a remand is appealable immediately. No case has so held, and, in light of the statutory structure governing appeals, *see* 28 U.S.C. §§ 1291, 1292, and the strong federal policy against piecemeal appeals, *see generally Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989); *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980); that is not a reasonable interpretation of the statute. The cases on which plaintiff relies in support of her jurisdictional arguments involved either final judgments, which are made appealable by § 1291, or orders granting or denying preliminary injunctions, which are made immediately appealable by § 1292(a). No final judgment has been entered in the present case, and no motion for an injunction is at issue. There being no statutory basis for the present appeal, we lack jurisdiction to hear the appeal.

We have considered all of Fulfree's arguments in support of immediate appealability and have found them to be without merit. The appeal is dismissed for lack of jurisdiction.

s/Amalya L. Kearse, U.S.C.J.
AMALYA L. KEARSE, U.S.C.J.

s/Pierre N. Leval, U.S.C.J.
PIERRE N. LEVAL, U.S.C.J.

s/William A. Norris, U.S.C.J.
WILLIAM A. NORRIS, U.S.C.J.

UNITED STATES COURT OF APPEALS
FILED OCT 4 1996
GEORGE LANGE, III, CLERK
SECOND CIRCUIT